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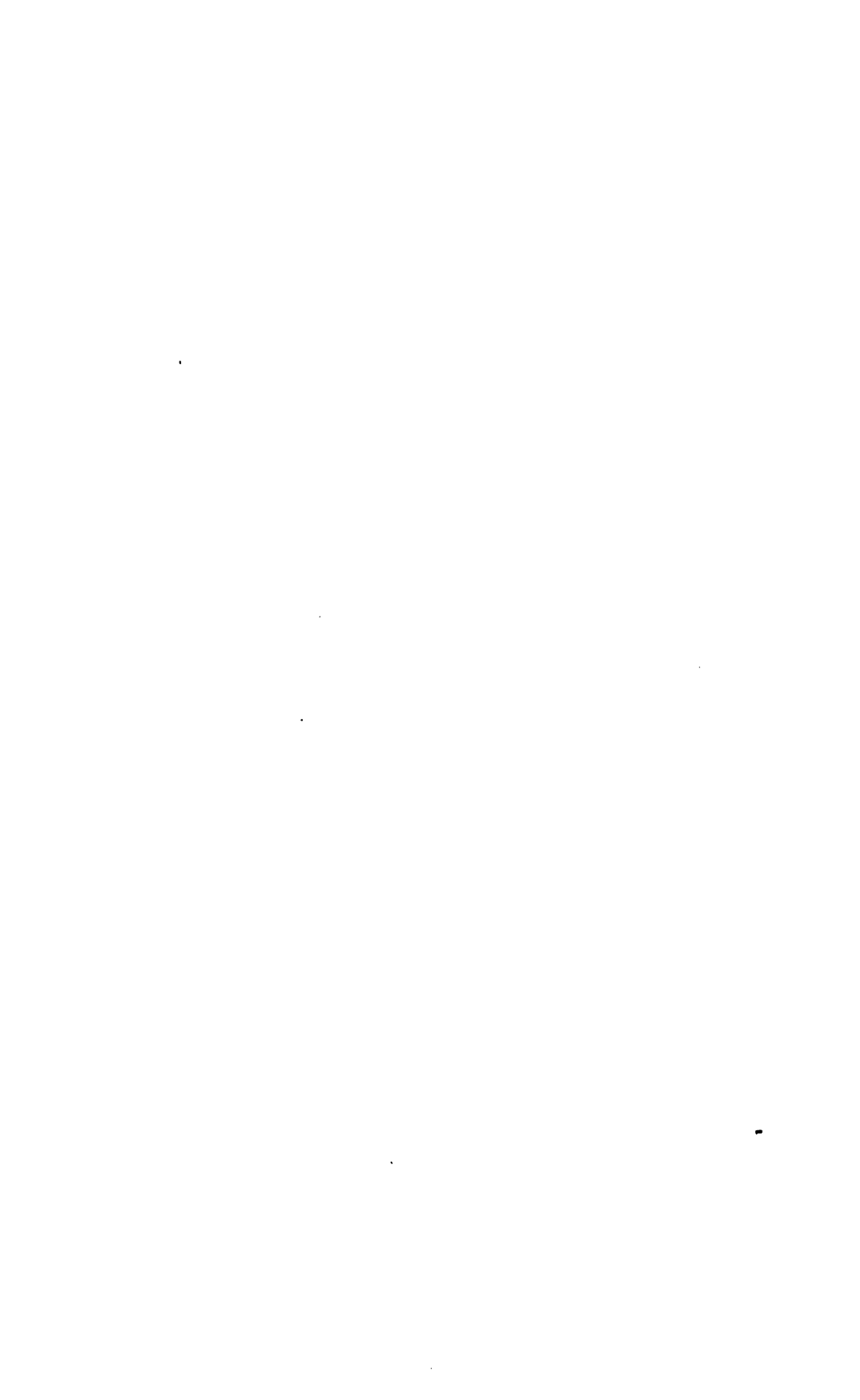
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THE REVISED REPORTS

BRING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.,
OF LINCOLN'S INN,

ASSISTED BY
O. A. SAUNDERS, OF THE INNER TEMPLE
(EQUITY CASES)
J. G. PEASE, OF THE INNER TEMPLE,
AND
WILLIAM BOWSTEAD, OF THE MIDDLE TEMPLE
(COMMON LAW CASES).

VOL. XCVII.

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PREFACE TO VOL. XCVII.

IN the first case of this volume the names of the parties are disguised in the barbarous manner of transcription which prevails to this day in the High Court of Calcutta, but has been reformed at Bombay. The more general grounds of decision are important, notwithstanding subsequent changes in the law and government of British India, in the learning of Statutes of Limitation considered as part of the *lex fori*. *Voyle v. Hughes*, p. 107, shows Vice-Chancellor Stuart at his best in the discussion of the steps by which equity judges came to recognize that an equitable reversionary interest in personalty was after all a form of property, and there was no reason why it should not be assigned and capable of even a merely voluntary assignment. That such an interest should for a long time seem of too fleeting and subtle a nature to bear conveyance was not surprising; and certainly there was nothing peculiar to equity in that habit of mind. At common law it was long doubtful whether the general owner of a chattel had any remedy at all in respect of it unless he had the immediate right to possession. *Freeland v. Stansfeld*, p. 306, may still be of some use for the guidance of the Court in exercising the large discretion purposely given by the Partnership Act, 1890, s. 40, as to the return of a proportionate sum where a premium has been paid on entering a partnership, and the partnership is prematurely dissolved. The effect of this and other authorities before the Act (which were not quite uniform) is summed up by Lord Cairns in *Atwood v. Maude*, L. R. 3 Ch. 369, 372.

Beanland v. Bradley, p. 228, is doubtless very good law. The only difficulty is to see how the plaintiff's counsel made any show of serious argument. Really the case almost

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naghten had said about *Lumley*
 on any question of principle ;
 further from his mind than to
 worthy of the most confused days
 text-books--of a specially high
 "right" under some special
 differ from the common right
 t, with such legal or equitable
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 freely conceded that isolated
 nance is merely transitory are
 fact, to furnish matter for the
ley v. Gye. But this is not to
 itself.

F. P.

[illegible]

deserved a head-note in the laconic manner of the late Sir Gregory Lewin: "A man is not presumed to intend fraud on his grandfather," or the like.

Couch v. Steel, p. 555, is a leading case on the question under what conditions there is an individual right of action for damage suffered by the plaintiff from breach of a statutory duty, for which breach the statute has ordained a public penalty.

Fisher v. Bridges, p. 701, was long ago censured by the learned editors of Smith's Leading Cases, and the censure has not been withdrawn by their successors, although the decision has been followed (1 Sm. L. C. 390, 11th ed.). We cannot see anything dangerous or capricious in holding that, when a certain payment of money is among the terms of an agreement whose principal object is a violation of the law, security given for that payment is no more enforceable than the original agreement. How far there is an indivisible illegal transaction, or how far a series of connected transactions may be lawful in part and unlawful in part, may certainly be a nice question in particular cases. But if a man chooses to give collateral security for the performance or observance of something which may be lawfully performed or observed, though an agreement to do so may not be enforceable (as being in restraint of trade or the like), it would seem arguable and indeed probable that the doctrine of *Fisher v. Bridges* does not apply.

Since *Lumley v. Gye* was reprinted in vol. 95 of the Revised Reports a case has been reported in which it was more or less discussed by Joyce, J. and in the Court of Appeal: *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908] 1 Ch. 335. Joyce, J. was inclined to revive the theory that the rule in *Lumley v. Gye* was confined to contracts for exclusive personal service, or something *ejusdem generis*; but this received no kind of encouragement, to say the least, in the Court of Appeal: see especially per Kennedy, L. J., at pp. 366, 367. It is curious that the discussion turned

much more on what Lord Macnaghten had said about *Lumley v. Gye* in *Quinn v. Leatham* than on any question of principle; it is certain that nothing was further from his mind than to raise the confusing vision—worthy of the most confused days of our old-fashioned equity text-books—of a specially high and meritorious “contractual right” under some special class of contracts, supposed to differ from the common right to performance of the contract, with such legal or equitable remedies as the case may require, which arises under an ordinary contract. It may be freely conceded that isolated contracts of which the performance is merely transitory are not the most likely, in point of fact, to furnish matter for the application of the rule in *Lumley v. Gye*. But this is not to deny the generality of the rule itself.

F. P.

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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

The Revised Reports.

VOL. XCVII.

BEFORE THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL.

IN RE LOWE'S PATENT.

(8 Moore, P. C. 1—3.)

1852.
Feb. 2.

The Judicial Committee will not permit a party to be heard in opposition to an application for a prolongation of the term of letters patent, unless a *caveat* has been entered in his name.

Any one of the public has a right to enter a *caveat* and to be heard in opposition at the hearing.

[See now Patents and Designs Act, 1907, s. 18.]

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

HER HIGHNESS RUCKMABOYE *v.* LULLOOBHOY
MOTTICHUND (1).

(8 Moore, P. C. 4—41.)

1851.
Dec. 5, 6, 7.
1852.
Nov. 26, 27.
1853.
Dec. 12.

The English Statute of Limitations, 21 Jac. I. c. 16, extends to India, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the Supreme Court.

The law of prescription, or limitation, is a law relating to procedure,

SIR JOHN
JERVIS.
[4]

(1) Present at the first hearing, on the 5th, 6th, and 7th December, 1851: The Right Hon. Dr. LUSHINGTON, the Right Hon. Sir GEORGE TURNER (Vice-Chancellor), and the Right Hon. Sir EDWARD RYAN.

Present at the second hearing, on the 26th and 27th November, 1852:

LORD TRURO, LORD CRANWORTH, the CHIEF JUSTICE of the Common Pleas (Sir JOHN JERVIS), the Right Hon. Dr. LUSHINGTON, the Right Hon. Sir GEORGE TURNER (Vice-Chancellor), the Right Hon. Sir EDWARD RYAN, and the Right Hon. Sir JOHN PATTESON.

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CHUND.

having reference only to the *lex fori*. [*British Linen Co. v. Drummond* (1), *Huber v. Steiner* (2).]

Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction.

Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular statute, in which they are used, the rule of construction of statutes requires, that the words used in that statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.

The words in the Statute of Limitations, 21 Jac. I. c. 16, s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally.

[It is thought needless to retain the rest of the head-note, which is concerned only with the application of the law to the special facts of the case.]

THIS was an action of trover, in which the appellant was the plaintiff, and the respondent and Sewlall Mottichund, since deceased, were defendants.

- [5] The plaint alleged, that the appellant, her Highness Ruckmaboye, of Malwa, a Hindoo, was possessed at Bombay, as of her own property, of two hundred chests of opium, and that the respondent and Sewlall Mottichund, Hindoo inhabitants, trading in Bombay, under the name and firm of Brizlall Mottichund, and,
- [*6] *therefore, persons subject to the jurisdiction of the Supreme Court, afterwards converted them to their own use. To this plaint the respondent and Sewlall Mottichund pleaded, first, not guilty; secondly, not possessed; and thirdly, that the causes of action in the plaint mentioned, did not, nor did any of them, accrue to the appellant at any time within six years next before the commencement of the suit.

After pleading these pleas, and before replication, Sewlall Mottichund died, whereupon a suggestion was entered on the roll, that Sewlall Mottichund had died, and that the respondent had survived him.

The appellant replied to the pleas of the respondent and Sewlall Mottichund, and joined issue on the first and second pleas; and to the third plea she replied, that, at the time when the causes of action in the plaint mentioned, and each of them, accrued, she (the appellant) was residing in India, in parts without the territories

subject to the government of the East India Company, and without the jurisdiction of the Supreme Court, to wit, at Rutlam, in Malwa ; and that she (the appellant) did not, at any time, from the time when the causes of action accrued, until within six years of the day of the commencement of the suit, come or return within the territories, or within the jurisdiction of the Court.

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To this replication to the third plea, the respondent pleaded, by way of rejoinder, that the appellant, *for a long time previously to, and at the time when, the alleged causes of action, and each and every of them, accrued to her, and from thence up to and until the time of the commencement of that suit, though personally resident in Malwa, was, and continued to be, a Hindoo, and carried on, and still carries on, the business or trade of merchandize at a shop or house of business situate in Moombadavee Street, in Bombay, under the name and style of "Gunnessdass Kistnaje," by a mooneem or gomastah (1), named Amerchund Keshorechund, and during all that time was, and continued to be, an inhabitant of Bombay, and subject to the jurisdiction of the Court, and that the goods and chattels in the plaint mentioned, were, at the time of the trover and conversion thereof in the plaint mentioned, in Bombay, and the goods and chattels of the appellant's Bombay firm.

[*7]

To this rejoinder the appellant demurred generally, and the respondent joined in demurrer.

The point marked by the appellant for argument of the demurrer was, "That the constructive residence of the appellant in Bombay, at the time when the cause of action accrued, or at any time since, was immaterial, if the appellant were at that time actually and in fact residing beyond the territories subject to the government of the East India Company."

The demurrer was argued on the 14th of November, 1848, and the 23rd of February, 1849, before Sir Erskine Perry, Chief Justice, and Sir William Yardley, Puisne Judge, of the Supreme Court, when it was adjudged by the Court, that the rejoinder of the respondent to the replication of the appellant to the third plea was sufficient in law ; and, by an order of the Court made on the last-mentioned day, it was *ordered, that the demurrer should be overruled, with costs.

[*8]

In compliance with the rule of the Privy Council (2), the Judges

(1) *Munim* and *gumdashta*, as they are more properly transcribed, appear to be synonymous terms for an agent or factor, the former a Marathi, the latter

a Persian word (Wilson's Glossary).—F. P.

(2) See rule, 3 Moo. P. C. p. xxv.

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of the Supreme Court transmitted to the Privy Council the following reasons, which governed the Court in overruling the demurrer to the third plea :

"The Supreme Court at Bombay, having, for some years past, held that the Statutes of Limitation (21 Jac. I. c. 16 (1), and 4 Anne, c. 16) apply to Bombay and to Hindoos, as well as to Europeans, on the ground of such laws being laws affecting procedure, and not affecting the contract (see Story's Conflict of Laws, p. 483, Edin.), the point argued before us was, whether the plaintiff, not residing personally within the jurisdiction of the Supreme Court of Bombay, was not to be considered as being 'beyond the seas' at the time of the cause of action accruing and of its being commenced.

[9] "Rutlam is one of the petty Rajpoot rajahships of Malwa, adjoining the Bombay Presidency, and tributary to Scindia, under the guarantee of the British Government. The plaintiff, who, by her title, is probably connected with the ruling family in Rutlam, appears by the record to keep a money-shop in Bombay, under an assumed name, which is a custom very prevalent amongst monied natives of rank in most parts of India.

"We thought that the expression 'beyond the seas,' which can only be applied *cy près* in India, did not include a place situated like Rutlam; and the case of *King v. Walker* (2) clearly shows, that the being without the jurisdiction of the Court is not equivalent to the above expression.

"We also thought, that the carrying on a business or trade in the island of Bombay amounted to a constructive presence in the island, so as to exclude the exception in the statute, even if Rutlam were to be considered as coming within the expression 'beyond the

(1) The section of this statute upon which the question raised turned, was the 7th; it is as follows :

"Provided nevertheless, and be it further enacted, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme*

covert, non compos mentis, imprisoned or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done. 20 Hen. III. c. 8; 3 Edw. I. c. 39; 32 Hen. VIII. c. 2; 1 Mary I. sess. 2, c. 5."

(2) 1 W. Bl. 286.

seas'; and we conceived, that the like conclusion would be arrived at by the Courts of Westminster Hall, if one of the great banking-houses in London, such as Coutts' or Hammersley's, which are often known to have been represented by a single individual, were to claim the right of bringing an action of assumpsit twenty years after the contract was made, on the ground, that the individual had been, during the period, 'beyond the seas.' "

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From the above judgment the present appeal was brought.

The appellant, in support of the appeal, submitted that the judgment of the Supreme Court ought to be reversed, for the following reasons :

First. Because the Statute of Limitations, the 21 Jac. I. c. 16, did not extend to India.

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Second. Because, at all events, it did not apply to an action between Hindoos.

Third. Because, even assuming that the statute did extend to India, and also, that it applied to an action between Hindoos, yet that it sufficiently appeared that the appellant was within the exceptions and saving proviso of the statute.

The respondent, on the other hand, relied upon the following reasons in support of the judgment of the Court below :

First. Because the rejoinder of the respondent to the replication of the appellant to the third plea of the respondent was sufficient in law.

Second. Because, under the circumstances, and under Reg. III of 1827, the appellant was an inhabitant of the island of Bombay, and subject to the jurisdiction of the Supreme Court at the time when the cause of action in the plaint mentioned accrued, and ever since had been entitled to sue and liable to be sued in that Court.

Third. Because, inasmuch as the appellant replied to the respondent's third plea, and tendered an issue thereon, it was not competent to the appellant to object, and she was estopped from objecting that the matters in the third plea pleaded, and the statutes on which such matters were and are founded, were not nor are applicable to India.

Fourth. Because any judgment given for the appellant on the plaint would be erroneous and bad in law, inasmuch as there was gross and manifest error in the record and proceedings in this, to wit, that *although the appellant by her plaint complained that the respondent wrongfully converted to his use "certain goods and

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chattels, to wit, two hundred chests of opium," yet she nowhere stated the value of such opium or chests, or of any part of it, or if it was of any value, and consequently no damages could be given against the respondent in respect of such alleged wrongful conversion.

The appeal was twice argued; in the first instance by

Mr. Peacock, Q.C., and Mr. Leith, for the appellant; and

Sir Frederick Thesiger, Q.C., Mr. Whateley, Q.C., and Mr. Bayley, for the respondent.

The case stood over for consideration. As the Committee who heard the appeal did not agree in opinion, the case was directed to be re-argued by one counsel on each side, and additional members of the Committee attended the hearing (1).

The appeal was re-argued by

Mr. Leith for the appellant; and

Mr. Whateley, Q.C., for the respondent.

The points relied upon in the arguments are distinctly stated and commented upon in the judgment.

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On the question of the application generally of English *statutes to India, *The Mayor of Lyons v. The East India Company* (2), *Ramchurn Chuckerbutty v. Radamohun Chuckerbutty* (3), *D'Conto v. Da Costa* (4), *Ramloll Thackoorseydass v. Soojumnul Dhondmull* (5), *Attorney-General v. Stewart* (6), 1 Smoult & Ryan's Rules and Orders, p. v., were cited; and, upon the extension to India, of the Statute of Limitations, 21 Jac. I. c. 16, *The East India Company v. Oditchurn Paul* (7), *Gyanchund Shaw v. Mirza Mahomed Cazim Ally Khan* (8), *Attaram Sircar v. Baillie* (9), *Verelst v. Levett* (10), *Kistnochunder Sircar v. Ramdhone Nundy* (11), *Trelochun Chatterjee v. Phillips* (12), *Mohun Persad Takoor v. Loll Beharry Takoor* (13), *Williams v. Jones* (14), Act, No. 14, of 1840 (introducing into India the 9 Geo. IV. c. 14) (15).

(1) See note (1), p. 1, ante.

(2) 43 R. R. 27 (1 Moo. P. C. 175).

(3) Morton's Decisions of Sup. Court, 353.

(4) Morton's Dec. S. C. 356.

(5) 79 R. R. 62 (6 Moo. P. C. 330).

(6) 16 R. R. 162 (2 Mer. 143).

(7) 7 Moo. P. C. 85.

(8) Morton's Dec. S. C. 337.

(9) *Ibid.* 336.

(10) *Ibid.* 340.

(11) *Ibid.* 345.

(12) *Ibid.* 341.

(13) *Ibid.* 342.

(14) 12 R. R. 401 (13 East, 439).

(15) Theobald's Acts of the Legislative Council of India, p. 390.

And, assuming the statute extended to India, whether it applied to an action of trover in the Supreme Court at Bombay by Hindoos. The Court being bound by the statutes, 21 Geo. III. c. 70, s. 17; 37 Geo. III. c. 142, s. 13; 4 Geo. IV. c. 71, secs. 7 and 9; 3 & 4 Will. IV. c. 85; and Bombay Charter, 8th of Dec., 1823, secs. 29 and 32, to decide the question, according to the Hindoo law, by which law the lowest limitation of suits is ten years: 1 Colebrooke's Dig., ch. cxiii.; 1 Strange's Hindoo Law, 308, 2 *ib.* 465, 477 (2nd edit.); 2 W. Macnaghten's Principles and Precedents of *Hindoo Law, 269; *Mahadan Dutt v. Mutteechund* (1), Bengal Regulations, III. of 1793, s. 14, and II. of 1805, s. 3, cl. 3; Bombay Reg. V. of 1827, ch. 1, s. 3, cl. 1; Bombay Code, 186.

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And, upon the question of the application of the *lex fori*, whether the English or Hindoo law of limitations was the rule, the following authorities were referred to: *The British Linen Company v. Drummond* (2), *Higgins v. Scott* (3), *De la Vega v. Vianna* (4), *Don v. Lippmann* (5), *Huber v. Steiner* (6), *Johnstone v. Beattie* (7), *Trimbey v. Vignier* (8), *Bury v. Goldner* (9), *Beerchund Podar v. Ramanath Tagore* (10), *Sree Mutty Moha Rane Comulcoonry v. Russickchunder Naoghy* (11), Story's Conf. of Laws, ch. xiv., secs. 556, 557, 577, 579 (2nd edit.), 1 Burge's Comm. on Col. and For. Law, ch. i. pp. 24 and 27, Story "On Bills of Exchange," ch. v. s. 146 (edit. 1843).

Upon the construction of the words of the exception in the statutes, 21 Jac. I. c. 16, s. 7, and 4 Anne, c. 16, s. 19, "beyond the seas," being synonymous in legal import to the words "out of the realm," used in the previous Statutes of Limitation, 1 Ric. III. c. 7, s. 3, 4 Hen. VII. c. 24, 32 Hen. VIII. c. 2, s. 9, *King v. Walker* (12), *Stowel v. Lord Zouch* (13), *Lane v. Bennett* (14), *Nightingale v. Adams* (15), *Battersby v. Kirk* (16), **Verelst v. Levett* (17), *Dwarris "On Statutes,"* 557, 669 (2nd edit.), 3 Burge's Comm. on Col. and For. Law, ch. x. p. 117, Co. Litt. 260 a, 260 b, 261 a, 261 b, statutes, 32 Hen. VIII. c. 2, 1 Mary,

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- (1) Morton's Dec. S. C. 344.
- (2) 34 R. R. 595 (10 B. & C. 903).
- (3) 36 R. R. 607 (2 B. & Ad. 413).
- (4) 35 R. R. 298 (1 B. & Ad. 284).
- (5) 47 R. R. 1 (5 Cl. & Fin. 1).
- (6) 42 R. R. 593 (2 Bing. N. C. 202; S. C. 2 Dowl. P. C. 781).
- (7) 39 R. R. 53 (10 Cl. & Fin. 42).
- (8) 41 R. R. 578 (1 Bing. N. C. 151).
- (9) 1 Dowl. & L. 834.

- (10) 1 Taylor & Bell's S. C. Reps. 131.
- (11) Bignell's Reps. 13.
- (12) 1 W. Bl. 286.
- (13) 1 Plowden's Rep. 376.
- (14) 1 M. & W. 70.
- (15) 1 Show. 91.
- (16) 2 Bing. N. C. 584.
- (17) Morton's Dec. 340.

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sess. 2, c. 5, 4 Anne, c. 16, s. 19, and 3 & 4 Will. IV. c. 27, were referred to.

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And, upon the fact pleaded in the replication, of the plaintiff being, at the time when the cause of action accrued, a resident at Malwa, an independent State without the territories of the East India Company, within the saving of the 7th section, *Smith v. Hill* (1), *Perry v. Jackson* (2), *Williams v. Jones* (3), *Strithorst v. Græme* (4).

As to the constructive inhabitancy of the appellant at Bombay, by carrying on business there by a gomastah, who was amenable to the jurisdiction of the Supreme Court, Bombay Reg. III. of 1827, c. 1, s. 3, cls. 1 and 2, *Thomson v. Davenport* (5), were cited.

On the objection to the pleadings. That it was necessary to aver that the parties were Hindoos, to entitle the plaintiff to insist upon the Hindoo law of limitations being applied, *Mahadan Dutt v. Mutteechund* (6), *Mohun l'ersad Takoor v. Loll Beharry Takoor* (7). That there was error upon the record, the plaintiff omitting to aver the value of the opium converted, and consequently that no damages could be given in respect of such conversion, *The Mayor of Reading v. Clarke* (8), *Arbouin v. Anderson* (9), *Darling v. Gurney* (10), Stephen "On Pleading," p. 332 (5th edit.). That the objection that the parties were Hindoos could not be now raised, as it was not contained in the points intended to be made upon the argument upon the demurrer to the replication, *Arbouin v. Anderson* (9), Stephen "On Pleading," p. 154, 2 Smolt & Ryan's Rules and Orders, p. 69, were severally cited.

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Judgment was reserved, and now delivered by

SIR JOHN JERVIS :

This is an appeal from a judgment pronounced for the respondent by the Supreme Court of Bombay, upon a demurrer to the rejoinder.

The plaintiff is in the ordinary form in trover, and describes the

- (1) 1 Wils. 134.
- (2) 2 R. R. 452 (4 T. R. 516).
- (3) 12 R. R. 401 (13 East, 439).
- (4) 2 W. Bl. 723; S. C. 3 Wils. 145.
- (5) 32 R. R. 578 (9 B. & C. 78, and 2 Sm. L. C. 212, where all the authori-

ties on this point are collected).

- (6) Morton's Dec. 344.
- (7) *Ibid.*, 342.
- (8) 4 B. & Ald. 268.
- (9) 1 Q. B. 498.
- (10) 2 Cr. & M. 226; S. C. 4 Tyr. 2.

plaintiff and defendants to be Hindoos, and the defendants to be merchants trading in Bombay.

The defendants pleaded the English Statute of Limitations, 21 Jac. I. c. 16, in the ordinary form.

The plaintiff replied that, during the period of prescription, she had resided in parts without the territories of the East India Company, and without the jurisdiction of the Court.

The defendant, the present respondent (the other defendant died before replication), rejoined, that the plaintiff had, during the period aforesaid, carried on trade in Bombay by an agent, and that the goods, at the time of the alleged conversion, were in Bombay, and were the goods of the plaintiff's Bombay firm.

The plaintiff demurred to this rejoinder, and after argument the demurrer was overruled, and judgment pronounced for the defendant.

By the notes of Chief Justice PERRY, of the reasons for overruling the demurrer, it appears, that the only question argued before the Court was the validity of the rejoinder.

The questions raised during the argument before this Committee were,

First. Whether the English Statute of Limitations, 21 Jac. I. c. 16, applies to those parts of India which are subject to the government of the East India Company.

Second. If the statute does apply, whether, as it appears by the record that the parties are Hindoos, the plea of the Statute of Limitations is a good plea.

Third. Whether the replication sets forth matter which shows the plaintiff to have resided, during the period of limitation, in parts "beyond the seas," within the meaning of the saving in the 7th section of the statute.

Fourth. Whether the rejoinder presents an answer in law to the replication.

During the argument of the objection to the plea, upon the ground of its being inadmissible in a suit between Hindoos, a doubt was suggested, whether the fact that the parties are Hindoos, sufficiently appears upon the record to give rise to the objection. Upon consideration, the Committee is satisfied that the fact does sufficiently appear.

The charter, which applies to the Court of Bombay, requires that regard should be had to the religion, manners, and usages of the natives of India, in the issuing and execution of process, and,

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therefore, to enable the proper process and service to be adopted, the plaint which precedes the process is required to state if the parties are Mahomedans or Gentoos, and, *in practice, the allegation in the plaint is regarded throughout the cause as a sufficient averment of the fact for all judicial purposes.

It does not appear that any objection was urged in the Court below upon this point, which is satisfactorily accounted for by the notoriety of the practice to the effect stated.

The first point to be considered is, whether the parts of India, under the government of the East India Company, are subject to the application of the statute, 21 Jac. I. c. 16.

This question appears to have arisen in the year 1811, in the case of *Williams v. Jones* (1), but no judgment was then pronounced upon it. In that case, the cause of action had arisen in India. The action was commenced in the Court of King's Bench, and the defendant pleaded the Statute of Limitations, to which the plaintiff replied the statute of 4 Anne, c. 16, s. 19, that when the causes of action accrued, and since, until within six years of the commencement of the action, the defendant was beyond seas. The defendant rejoined, and pleaded the existence of the Supreme Court at Calcutta, as established by the charter, under the 13 Geo. III. c. 63, having a like jurisdiction as the Judges of the Court of King's Bench, within Great Britain, and that at the time and more than six years after the cause of action accrued, both plaintiff and defendant resided within the jurisdiction of that Court, and were subject thereto, and that no action had been commenced. Upon the part of the plaintiff, it was contended that, by the very terms of the statute, it could not apply to India, as the exceptions in favour of parties being beyond seas could not apply to India, the seas meant *in the statute being the four seas of England; and further, that even if the statute did extend to India, either without the exception or with a different sense to be put upon it, still the jurisdiction of the Court of King's Bench was not excluded. The case was decided upon the ground, that at all events the jurisdiction of the Court of King's Bench was not excluded; and Lord ELLENBOROUGH said, assuming that the statute and charter referred to had given jurisdiction to the Indian Courts, and that the Courts had adopted the Statutes of Limitation, still those statutes could only have the effect of barring the remedy in those Courts, but did not extinguish the right.

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The extent of the authority of this case is merely that Lord ELLENBOROUGH did not express any doubt of the competency of the Courts in India to adopt the statute.

It is abundantly clear, that since the year 1811 the statute has been adopted in India, and made the foundation of judgments by the Supreme Courts there, and that adoption has been recognized and acted upon by this jurisdiction, in the case of *The East India Company v. Odichurn Paul*, reported in the 5th volume of Moore's Indian Appeal Cases, page 43, in which case the statute was pleaded on the part of the East India Company, whose agents could not but be fully informed whether the statute was acted upon in the Courts in India. The recognition and adoption by this jurisdiction of the plea in that case, is, of course, of the greatest weight upon the present occasion.

The case was an action of assumpsit, brought to recover damages for the breach of a contract, in not delivering a quantity of salt. The East India Company *pleaded, among other pleas, that the cause of action did not arise *infra sex annos*. The plaintiff took issue upon that plea. The cause was afterwards tried before two of the Judges, who, upon the evidence there given, held, that the cause of action did accrue within six years, and entered the verdict for the plaintiff, upon the issue joined upon that plea. A motion was afterwards made for a new trial, which was refused, and the East India Company appealed against the rule refusing the new trial, and contended that the evidence proved the cause of action to have arisen more than six years before the commencement of the action.

No question was raised by the parties during the argument of that case, as to the application of the statute to India; but Lord CAMPBELL inquired of the Bar, if the statute, 21 Jac. I. c. 16, extended to India, and was answered by the then *Attorney-General*, of counsel for the East India Company, that it was introduced into India previously to the charter, and that statement was not controverted by the counsel for respondent, of whom *Mr. Leith* was one, a gentleman long eminent as a practitioner at the Indian Bar, and consequently well acquainted with the practice. The Judicial Committee considered, that the plea of the Statute of Limitations was not in that case entitled to favour, and would have been astute to discover any ground upon which the verdict which had been entered for the plaintiff (the respondent) could be supported. But the Committee held, that the facts established that the cause of

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action had arisen more than six years before the commencement of the action, and made the rule absolute for setting aside the former verdict for the respondent, and for a *new trial; thus upholding the plea against the apparent merits of the case.

This Committee is satisfied that the Statute of Limitations has been adopted and acted upon by the Courts in India, and such adoption has been recognised and acted upon by this jurisdiction, and the Committee considers that such application of the statute ought not now to be questioned, whatever doubts might have originally existed on the subject.

The statute being applicable to India, it becomes necessary to consider, whether a residence in India, but out of the territories under the government of the East India Company, is, in legal import, a residence "beyond the seas" within the meaning of the statute, 21 Jac. I. c. 16, sec. 7.

These words "beyond the seas" are of extensive application in the law, many ancient rights being saved by the common law, to persons "beyond the seas;" it is, therefore, of considerable importance to ascertain what has been deemed to be the legal import and meaning of them, because, if it shall appear that they have long been used, in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense, long prior to the Statute, 21 Jac. I. c. 16, the rule of construction of statutes will require, that the words in the statute should be construed according to the sense in which they had been so previously used, although that sense may vary from the strict literal meaning of them.

[*21] The statute, 21 Jac. I. c. 16, was the first statute which limited the period in which personal actions should be brought, but that statute seems to *be strictly *in pari materia* with the 32 Hen. VIII. c. 2, which limited the period during which real actions should be brought, and also with other statutes, which may be called Statutes of Limitation, such as the Statute of Fines, which limited the period for making entry and taking proceedings to avoid fines. The object of the provisions in all the statutes referred to is the same, that is, to give effect to the maxim, *Interest reipublicæ ut sit finis litium*.

The words "beyond the seas," as before stated, were well known to the common law, before the enactment of any statute containing those words; as in the case where a descent was cast after a

disseizin, the entry of the disseizor was tolled, unless the disseizee was beyond the seas; and relief from forfeiture, by default, of copyholds, is, in many cases, allowed by reason of the defaulters having been beyond the seas, as in *Underhill v. Kelsey* (1).

The question, therefore, is, whether the words "out of the realm," or "out of the lands," or "out of the territories," are synonymous, in legal import, with the words "beyond the seas." To arrive at a correct conclusion, it will be necessary to refer to the various statutes and authorities.

The first statute, relevant to this subject, is the statute, De Donis, 13 Edw. I., which enacted, that fines in certain cases should be void, and that neither heirs nor reversioners need make any claim, though they should be within England. This enactment seems to have referred to the law of "continuall claime," which was subject to a saving in favour of persons "beyond the seas."

The 18 Edw. I., stat. 4, makes fines binding upon all parties and privies "within the four seas."

Littleton, in section 441, treats of the law before the Statute of Non-claim, 34 Edw. III. c. 16, and says, "So it is proved, that if a stranger that hath right unto the tenements, if he were out of the realme at the time of the fine levied, &c., shall have no dammage, though that hee made not his claim." And Lord Coke, in the Second Inst., p. 387, in reading upon the statute of 13 Edw. I., says, "Hereby it may be gathered (as the law was), that a fine at the common law did not bind a stranger that was within age, in prison or beyond the seas." Further, Littleton, in chapter vii., on "Continuall Claime," section 439, says, in reference to excuse for "continuall claime," "In the same manner it seemeth, that where a man is out of the realme, and the disseizor dieth seized, that such discent shall not hurt the disseizee, but for that hee could not make continuall claime, it seems to them, that when he commeth into England he may enter."

It will be observed, that in this section, Littleton uses the words, "out of the realme," and "commeth into England," in reference to rights which had been preserved to persons who should, in technical language, be "beyond the seas." And Lord Coke, in commenting upon this section, (260 b,) says, "*Hors du royaume* (*id est*), *extra regnum*; as much as to say, as out of the power of the King of England as of his crowne of England; for, if a man be upon the sea of England, he is within the kingdom or realme of

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England, and within the ligeance of the King of England, as of his crowne of England. And yet **altum mare* is out of the jurisdiction of the common law." He afterwards says, "And note, Littleton saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of England, or the dominions of the same."

In the above statement of the section in Littleton, certain words have been omitted which are in the section, which import that the absence beyond seas should be in the service of the King; but those words are irrelevant and immaterial, as it distinctly appears in subsequent sections and commentaries, and in Bracton, lib. 5, fol. 436, referred to by Lord Coke, "that the being in the King's service is not a qualification attached to the being beyond seas."

In Littleton, section 440, the words "out of the realme" and "within the realme," are used ten times in reference to this saving, by being "beyond the seas," and the comments upon this section, (261 a, 261 b,) which treat at large the proper mode of pleading in reference to this subject, frequently adopt the expression "out of the realme."

It appears to the Committee that these statutes and commentaries establish, that the words "being out of England," "out of the realme," and "beyond the seas," were deemed to be synonymous in legal import; and the several statutes relating to fines have also a bearing upon the question.

The statute, 1 Ric. III. c. 7, s. 3, binds all parties by the fine, except those "out of this realm of England." And in sec. 6, actions are saved if brought within five years after coming "within this land." The 4 Hen. VII. c. 24, refers to persons "out of the *realm." The 23 Eliz. c. 3, s. 3, saves writs of error to recover fines to persons "beyond the seas." The 27 Eliz. c. 9, s. 3, on the same point. The saving is also to persons "beyond the seas." There is a material case reported in Fitzherbert's Abr. under the title of "Continuall Claime et non Claime," and which is cited in *Stowel v. Lord Zouch* (1). Fitzherbert is, of course, of the highest authority, and Lord ELLENBOROUGH said, that no better authority than Plowden could be cited. The case is thus stated. In the 8 Ric. II., a party pleaded in bar a fine, levied before the Statute of Non-claim, and alleged, that the plaintiff was, a year and a day

after the fine levied, within the four seas, and did not claim. The plaintiff replied, that he was at that time in Scotland the whole year and a day, without that he was in England. And it was held, that Scotland being another land and another realm by itself, the replication was sufficient.

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The right of entry of a disseizee, in the absence of continual claim, being by the common law saved by an absence "beyond the seas," this case shows, that Scotland, being out of the realm, was within the saving being "beyond the seas." Further, the case itself referred to a saving in a statute expressed in the words "beyond the seas." But Fitzherbert, by reporting the case under the head of "Continuall Claime et non Claime," evidently meant, that a residence in Scotland would also be within a common law saving expressed in the same words.

Lord Coke's Commentaries, 260 a and 260 b, upon Littleton, secs. 439 and 440, will be found quite confirmatory of the principle of the decision before mentioned.

The statute of the 32 Hen. VIII. c. 2, is immediately in connection with the 21 Jac. I. c. 16. That statute first required, that all real actions should be brought within a definite number of years by all persons within the realm, and saved the remedies to other persons within certain periods after coming within the realm, and it was correctly asserted by *Wedderburn*, of counsel in the case of *King v. Walker*, hereafter mentioned, that Sir Robert Brooke, a very high authority, in his learned readings upon this statute, always considered and used the words "out of the realm" as synonymous with the words "beyond the seas." The passage referred to in Brooke will be found in the seventh lecture, page 121, and in the eighth lecture, pages 121 and 123.

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In section 2 of the statute, 21 Jac. I. c. 16, it is enacted, that if any person being entitled to writs in real actions, &c., shall be "beyond the seas," then such persons' rights are saved to them for ten years after coming into this realm; and in section 7, it is enacted, that if persons entitled to bring personal actions shall, when the cause of action accrues, be "beyond the seas," then such persons may sue within the limited period, after they shall have returned from "beyond the seas."

The statute, 4 Anne, c. 16, saves the right of certain actions in reference to the words "beyond the seas."

There are two decisions upon the statute of 21 Jac. I. c. 16, to which it is necessary to advert.

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The case of *King v. Walker* (1), in which to an action of *assumpsit* the defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, that he had been resident in foreign parts out of the *kingdom of England, to wit, at Glasgow, in Scotland. The defendant demurred. The Court held the replication bad, upon the ground, that by the Act of Union, Scotland became part of the realm of Great Britain, and was no longer "beyond the seas," which words were satisfied only by a party being beyond what constitutes the realm for the time being. *Wedderburn*, in support of this replication, said, that persons out of the jurisdiction of the Courts of the country, though not literally "beyond the seas," or out of the King's subjection, were yet within the saving of the statute, and referred to Brooke's reading before mentioned; but DENNISON, Justice, said, this is a new experiment, and that the Statutes of Limitation of James and Anne were both express, that the party to be excused must be "beyond the seas," and that he did not understand what the replication meant, by "foreign parts," and that the party must be "beyond the seas," which was the old and true expression; and added, that "before the Union, England was an island of itself; since the Union, Scotland is made part of it." From the observations of WILMOT, Justice, it would seem that the word "island" is stated by mistake of the reporter, instead of kingdom. WILMOT, Justice, said, "There is no such kingdom as England now. Plaintiff, therefore, while in Scotland, was not out of the realm. Besides, that is not now the phrase: the Legislature, by altering it to beyond the seas, at such a critical juncture, seems to have pointed at this very case of dwelling in Scotland."

The alteration here spoken of, perhaps referred to the adoption of the words "beyond the seas" in this statute, while the words in the 32 Hen. VIII. c. 2, were "out of the realm."

[27] The experiment referred to by Mr. Justice DENNISON was the attempt to make the words, "out of the jurisdiction of the Court," synonymous with the words "beyond the seas."

The substance of the determination is, that the words "beyond the seas," within the meaning of the saving clause, could only be satisfied by the party being out of what should constitute the realm for the time being, and that Scotland, at the time of the plea being part of the realm, was, therefore, not within the saving.

The decision so understood is consistent with, and to the same effect as, the case reported in Fitzherbert, and cited in Plowden,

(1) 1 W. Bl. 286.

and with the doctrine stated in Lord Coke's Commentaries, 260 b ; inasmuch as in the time of Richard II., Scotland was " out of the realm," and, therefore, might be well deemed to be " beyond the seas," within the statute ; and at the time of the case of *King v. Walker*, Scotland had become part of the realm of Great Britain, and, therefore, had ceased to be " beyond the seas," within the meaning of the statute. After the Union with Scotland, difficulties arose in regard to the effect of writs of *ne exeat regno*, which, while restraining the parties from going out of the realm, permitted them to go to Scotland, which was out of the jurisdiction of the Court, and it was deemed necessary to alter the writ and the recognizance, by extending the restraint to Scotland by name.

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The case of *Lane v. Bennett* (1) calls for some remark. The plaintiff, in answer to a plea of the Statute of Limitations, replied, the residence of the defendant in Ireland. Issue was taken upon the replication, and a verdict *found for the plaintiff. A motion was afterwards made by the defendant to enter judgment for him *non obstante veredicto*, upon the ground, that Ireland was not now a place " beyond the seas " within the 4 Anne, c. 16, s. 19. The Court discharged that rule upon the authority of a decision by Lord Holt, in a case erroneously cited as the case of *Nightingale v. Adams* (2), but the case intended was an *Anonymous* case (3), in which Lord Holt is reported to have held upon consideration, upon the Statute of Limitations, 21 Jac. I. c. 16, that Ireland was " beyond the seas " within the meaning of that statute. Lord ABINGER, in delivering judgment in *Lane v. Bennett*, entered largely into the question of the legal import of the words " beyond the seas," and referred to many of the statutes before mentioned, and to Littleton and Lord Coke's Commentaries as authorities, that the words " beyond the seas " and " out of the realm," had been used as synonymous in legal meaning, but decided that Ireland continued to be a place " beyond the seas," notwithstanding the Act of Union. The case of *King v. Walker* is mentioned in the judgment by Lord ABINGER, as a decision negating that the words " beyond the seas " and " out of the realm " are synonymous, but it may be doubted whether that view of the decision was correct. It would rather seem, as before stated, that the Court held, that the meaning of the expression " beyond the seas " was beyond, or " out of the realm," and that at the time of the replication, Scotland was

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(1) 1 M. & W. 70.

(3) 1 Show. 61.

(2) 1 Show. 91.

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not "out of the realm," and, therefore, not "beyond the seas," and consequently not within the saving. The judgment also referred to a note in Jenkins's Eight Centuries, Case 18, that since the Union, *a husband while in Scotland would not be deemed beyond the seas so as to create the presumption of non-access.

In the case of *Battersby v. Kirk* (1), it was also held, that Ireland, for the purpose of that decision, was a place "beyond the seas." The question was, whether goods landed in the Bristol Docks were liable to the dues imposed by the Bristol Dock Acts, upon goods imported from parts beyond the seas. The case underwent an elaborate argument upon the effect and construction of several statutes relating to the trade, navigation, and various other matters connected with Ireland, all of which are foreign to this case. The judgment turned entirely upon the construction of those statutes, and with reference to them, goods from Ireland landed in the Bristol Docks were deemed to be subject to the dues imposed upon goods imported from parts beyond the seas. That case, therefore, does not seem to have any application to the present case.

The Committee, therefore, are of opinion that the Statute of Limitations must at this time be deemed to be applicable to India; and that to construe the 7th section literally would be to withhold the benefit of a saving from India, which it was intended by the Legislature should prevail where the statute was contemplated to operate at all, that is in England, and that it would be contrary to reason and justice to hold, that the Legislature should be deemed to have intended that the statute should become operative in any place where, by a due construction of the 7th section, the saving could not apply.

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A necessity that the words "beyond the seas" should be construed literally, would create a great *doubt of the correctness of the decisions which hold the statute to be applicable to India, but if those words legally construed will give to India all the benefit which the Legislature intended the statute should bestow, the adoption of the statute in India, in that case, seems to be free from objection, as the policy of the statute seems equally applicable to India as to England. And, upon a review of the text books, statutes and decisions, we are of opinion, that the words of the statute, 21 Jac. I. c. 16, "beyond the seas," are in legal import and effect synonymous with the words "out of the territories" and

(1) 2 Bing. N. C. 584.

“out of the realm,” and that the replication, therefore, discloses a valid answer to the defendant's plea.

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If the words of the replication are equivalent to the words “beyond the seas,” then the plaintiff is within the express provision of the 7th section, and the statute would be no bar. It is no answer to say, that the party might sue or be sued during the whole time, by reason of a constructive inhabitancy. That might probably give the Court jurisdiction, but will not prevent the express operation of the 7th section. A plaintiff may be in England for six years, but, nevertheless, if he be in prison when the cause of action arises, during the whole period, he may sue when he comes out of prison, notwithstanding that he might have commenced an action at any moment whilst he was in prison, if he had so thought fit. The words of the 7th section are express, and the plaintiff is within them.

The case therefore, as regards this question, stands in this predicament, that if the statute of James does not operate in India, the plea is bad; and if it does operate, the replication contains a legal answer to it. *And, therefore, *quocunque via data*, the appeal upon this point ought to be allowed.

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But it has already been stated, that the plea is objected to upon another and distinct ground, namely, that although the Statute of Limitations may be applicable to India, yet that such statute cannot be pleaded in this cause, in which the plaintiff and defendant are Hindoos.

If the recommendation of the Committee, which will be founded upon the opinion before expressed, shall be confirmed and adopted by her Majesty, the appeal will be allowed irrespective of the objection referred to, but, as that objection has been supported by arguments founded upon the supposed construction of the charter, and upon an alleged inconsistency in the course of procedure of the Supreme Court with the provisions of the charter, the Committee have deemed it expedient, with the view of preventing future litigation upon the same question, so far as the expression of its opinion may tend to effect that object, to investigate and consider the merits of the objection more largely than was necessary for the decision of the present case.

The course of procedure in the Supreme Courts necessarily differs from that which prevailed in the native Courts, and such difference may frequently cause suits to be determined in the Supreme Courts otherwise than the same would have been determined if they had

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been instituted in the native Courts; and the question may, therefore, frequently arise, whether such judgments of the Supreme Court ought to be deemed to be inconsistent with the charter where they are the result, not of the application of any law relating to the "inheritance and succession to lands, *rents, and goods, and all matters of contract and dealing" between the parties, but from the difference in the course of procedure only in the respective Courts.

It is necessary, to a due consideration of the question, whether the plea can be allowed consistent with the provisions of the charter, that the objection against the plea should be stated with precision and accuracy, because it should be observed in the outset that the plea does not raise any question relating to "inheritance and succession to lands, rents, and goods, and to all matters of contract and dealing" between the parties; and that the validity of the plea does not depend upon the application of any law or usage relating to any of those matters, but that the validity of the plea depends upon the question, whether the course of practice, or procedure, as it is called, under the authority of which it is pleaded, is consistent with the charter.

The substance of the objection to the plea seems to be, that a judgment in favour of the defendant, founded upon the plea of the Statute of Limitations, would be a determination upon the rights in litigation between Gentoos, by virtue of a different law than that by which the same suit would have been determined in a native Court, if instituted there. And it is conceded that the plea would not have been available in a native Court.

The merit of this objection depends upon the construction of the charter, to which it is, therefore, necessary to refer.

The charter contains four sections, which relate to the question, the 29th, 37th, 38th, 39th.

[*33] The 29th section is the governing section upon this point, and is to the following effect, namely, that in *suits between Mahomedans or Gentoos, their inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined by the laws and usages of the Mahomedans and Gentoos respectively, or by such laws and usages as the same would have been determined if the suit had been brought in a native Court.

The 37th section requires the Court to frame processes, in criminal as well as in civil suits, and the rules for the execution

of such processes, with an especial attention to the religion, manners, and usages of the inhabitants, and the circumstances of the country, so far as the same could consist with the due execution of the law and the attainment of justice.

There are two other sections in the charter (the 38th and 39th), which show, that it was not intended that the Charter Court should adopt the course of procedure which prevailed in the native Courts, but that the suits between Gentoos and between Mahomedans, in such Court, should be by a course of procedure, to be framed by the Charter Court itself.

It will be observed, that although the charter provides that the law, which would be administered in the native Courts in the specified cases, should also be adopted in the like cases in the new jurisdiction, yet the form of procedure in the native Courts was not to be imported into the new Court, but that the new Court was to frame its own course of procedure, having regard to the law by which its decisions were to be governed in suits between Gentoos and between Mahomedans.

Considering the different rules of evidence, modes *of purgation and proof, and the numerous other distinctions, in form and substance, necessarily resulting from the different systems of religion and government applicable to the different Courts, it is obvious, that the forms of procedure in the native Courts could not be imported into the Supreme Court, to be presided over by English Judges; and, accordingly, the duty is imposed upon the Supreme Court to frame rules, orders, and processes, for the conduct and prosecution, in that Court, of the suits referred to. That duty could only be effectually performed by attaching certain consequences, results, or penalties, to the non-observance of, or to a departure from, the ordained rules and course of procedure, some of which consequences might lead to a determination of the suit upon points independent of the merits involved in the cause, or the law applicable to the cause of action, or matters in litigation, and it would be difficult to maintain that a determination of the suit, under such circumstances, would be inconsistent with the charter.

The charter, while creating the new Court, provided for two objects. The one object was, that the rights of Gentoos and Mahomedans, in regard to the matters specified in the charter, should be adjudged in the new jurisdiction, according to the laws by which they would have been determined in a native Court. The

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other was, that the course of procedure in the new jurisdiction, by which such law was to be administered, should be consonant with the religious feelings, usages, and manners of the native suitors.

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The first object seems to have been attained by placing Gentoo and Mahomedan suitors in the Charter Court in the position in which, by the comity of nations, parties are placed who sue in the Courts of *one country, in respect of rights or causes of action which have their origin in a foreign country. In such suits the *lex fori* adjudicates upon the rights and matters in litigation, according to the law of the country where the rights or causes of action arose; and, consistently with that course, the charter provides, that Gentoos and Mahomedans, who live and conduct their transactions under certain systems of law and government peculiar to them respectively, shall have their rights and causes of action decided upon, in the Supreme Court, by the same law by which they would have been determined in a native Court.

It was confided to the Court to secure the second object, by establishing rules, orders, and processes for the regulation of causes in the Supreme Court, between Gentoos and between Mahomedans.

Upon the part of the defendant, it is contended, the plea is valid and warranted by the charter, notwithstanding that such plea would not have been available if the suit had been instituted in a native Court.

The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, and the Committee are of opinion correctly insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decision in the courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a *law relating to procedure having reference only to the *lex fori*.

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It is said, in Story's Conflict of Laws (1), in the course of section 579, that "the law of prescription of a particular country, even in a case of contract made in such country, forms no part of

the contract itself, but merely acts upon it *ex post facto* in case of a suit; it cannot properly be deemed a right stipulated for, or included in the contract. Even these foreign jurists do not pretend that the prescription of a country, where a contract is made, constitutes a part of the contract."

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And, in section 580, in contending against a passage in Baldus, he says, "The question is, whether it is a matter of the original merits, as, for example, a question of the original validity, or interpretation, or discharge of a contract, or whether it is a matter touching the time and mode of remedial justice, which is provided by law to redress grievances, or to prevent wrongs, or to suppress vexatious litigation." And, in a subsequent part of the section, he says, "Considered in their true light, statutes of limitation or prescription are ordinarily simple regulations of suits and not of rights. They regulate the times in which rights may be asserted in courts of justice, and do not purport to act upon those rights." And then he adds, "Pothier very properly treats prescription, not so much as an extinguishment of the debt or claim, as an extinguishment of the right of action therein. And this is precisely the manner in which the subject is contemplated at the common law, as well as by many foreign jurists."

Consistently with this view, while the Courts of almost all civilised countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription of the country in which it exercises its jurisdiction.

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In section 576 of Story's Conflict of Laws, the law is thus succinctly expressed: "In regard to statutes of limitation or prescription of suits, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods, within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason, and no sound policy, in allowing higher or more extensive privileges to foreigners, than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy."

Then follow many important observations, showing the wisdom and justice of the law of prescription, but which will not aid in the investigation of the question under consideration.

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In section 577, Mr. Justice Story proceeds: "It has accordingly become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought (*lex fori*), otherwise the suits will be barred; and this rule is as fully recognised in foreign jurisprudence as it is in the common law. Not, indeed, that there are no diversities of opinion upon this subject; but the doctrine is established *by a decisive current of well-considered authorities." The author then quotes numerous foreign writers on jurisprudence, in confirmation of the law as stated in the text. The author also refers to several cases, in which the courts of law of this country have acted in conformity with the principles there stated. A summary of those cases will be found in the note to the case of *Mostyn v. Fabrigas* (1); and the case of *Huber v. Steiner* there mentioned, and reported in 2 Bing. N. C. 202 (2), is a leading authority upon the subject.

There are two cases which mark distinctly the application of the law as stated in Story. The case of *The British Linen Company v. Drummond*, which was a suit in England, upon a contract made in Scotland, where the prescription is forty years. The plaintiffs sued in England, where the defendant pleaded the statute, 21 Jac. I. c. 16, which was held to be a good plea.

Huber v. Steiner was a suit in England, upon a promissory note made in France, where the prescription is shorter than in England. The suit was commenced in England after the expiration of the French prescription, but within six years. The defendant pleaded the French prescription, but which was held to be a bad plea.

It appears to the Committee, after much consideration, that the plea is an admissible and valid plea in this suit, and that the allowance of it is alike consistent with the 29th section of the charter as with the 37th section, the terms of which section have been already stated.

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The 37th section of the charter has been commented upon, as tending to show that no course of *procedure in the Charter Court can be valid and consistent with the charter, which should authorise a judgment in a suit between Gentoos, founded upon any law other than that by which the same suit would have been determined in a native Court; but, on an attentive perusal of that section, it will be found to refer only to process and its execution, and that no restriction or duty is imposed upon the Supreme Court

(1) 1 Sm. L. C. 367.

(2) 42 R. R. 598.

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in regard to the process and the rules and orders for the execution of them, except that they shall be respectively framed with an especial attention to the religion, manners, and usages of the native inhabitants, and accommodating the same to the circumstances of the country, so far as the same could consist with the due execution of law, and the attainment of substantial justice.

This section is merely auxiliary to the 29th section, and does not extend its effect in relation to the question of the validity of the plea; and, supposing a plea could be held to be included in the word "process," there is no ground for saying that it is inconsistent or repugnant to any part of, or any matter contained in, this section.

The fallacy which is imputed to the argument against the plea, is, that it confounds a determination of the suit, with the determination of the right or cause of action in litigation in the suit; whereas it is said, that a judgment for the defendant upon this plea will be no determination founded upon any law relating to the rights or merits involved in the cause of action, the judgment will be consequential upon what may be deemed to be a default on the part of the plaintiff in the proceedings in the *lex fori*. The Supreme Court was to frame a course of procedure, and *it would be incident to that duty to enforce conformity to such course by attaching certain consequences to default, departure, or disobedience. The time for appearing, for declaring, for pleading, and for taking the several steps in the cause, and the forms of the several proceedings, would all be within the province of the Court to prescribe, and, consequently, within its authority to give a judgment for plaintiff or defendant, as the penalty for defaults, disobedience, or departures from the prescribed rules. The Court could not exercise its jurisdiction effectually without such a power.

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It may be asked, would the charter be contravened by a judgment upon a demurrer for imperfect pleading, or a judgment of *non pros* for not declaring, or a judgment by default for not pleading, applying, &c.? In each of which cases, unless the practice of the Charter Court should be in exact conformity with the native Courts, the suit would be determined by a law other than that by which it would have been determined in a native Court; but that the charter would be thereby contravened, it seems difficult to maintain. A judgment for the defendant upon the plea, that the action was not commenced in due time, seems of the same character as the judgments for default, or departure, before referred to.

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The charter meddles not with a course of procedure in the Supreme Court, or its consequences, which shall not be inconsistent with the native laws relating to the contract, trade, or dealing, out of which the litigation may arise, and which shall not be repugnant to, or in violation of, the religion, manners, and usages of the natives. The determination of the Supreme Court upon the rights arising out of contracts, tradings, *or dealings, and their incidents, must be consonant with the law, religion, manners, and usages of the Gentoos, but the allowance of this plea will not constitute a determination relative to any right arising out of the contract, or dealing, to which the cause of action refers, and the course of procedure by which the plea is allowed is not otherwise than consonant to the religion, manners, and usages of the litigant parties.

It remains only to repeat the opinion of the Committee, that the judgment pronounced in the Supreme Court ought to be reversed, that the appeal should be allowed, and the cause be remitted.

ON PETITION FROM THE COURT OF THE GOVERNOR AND COUNCIL AT
SIERRA LEONE.

1852.
Feb. 7.

PATNELLI v. HEDDLE.

(8 Moore, P. C. 41—46.)

Leave to appeal granted from an order of the Governor and Council at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under 400*l.*, the appealable value limited by the Charter of Justice: that Court having refused to hear counsel in support of the rule on the merits of the case or the questions of law raised.

FROM SIERRA LEONE.

WILLIAM RAINY v. THE JUSTICES OF SIERRA
LEONE (1).

(8 Moore, P. C. 47—63.)

1852.
Feb. 7 (2).
1853.
July 1, 2 (3).

Lord
CRANWORTH.
Rt. Hon. Dr.
LUSHINGTON.
[47]

The Judicial Committee have no jurisdiction to entertain an appeal from orders made by a court of record in the Colonies, inflicting fines upon a practitioner for contempts of Court; such Court being the sole judge of what constituted the contempts.

Upon a reference by the Colonial Office to the Judicial Committee,

(1) Appr. *McDermott v. Judges of British Guiana* (1868) L. R. 2 P. C. 341, 362, 364; and see *In re Pollard* (1868) *ibid.* 106, 118.

(2) Present: Lord CRANWORTH, the Lord Justice KNIGHT BRUCE, the Right Hon. Dr. LUSHINGTON, and

the Right Hon. Sir EDWARD RYAN.

(3) Present: The Lord Justice KNIGHT BRUCE, the Lord Justice TURNER, the Right Hon. Dr. LUSHINGTON, and the Right Hon. Sir EDWARD RYAN.

referring the whole matter of complaint against the Judge concerning the contempts and the infliction of the fines, for their advice and opinion; the Committee advised the Crown to remit part of the fines, which, by an Order in Council, was directed.

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THE appellant in this case, an advocate and practitioner of the Courts in the colony of Sierra Leone, complained of four orders of the Recorder's Court at Sierra Leone, bearing date the 19th, 20th, and 24th days of September, 1851, imposing upon him several fines, amounting in the whole to 130*l.*, for contempts of Court, alleged to have been committed by him while engaged in his professional character of advocate in conducting the cause of *Patnelli v. Heddle* (1) in the Recorder's Court, and also of a decision of that Court, dated the 13th of October, 1851, refusing a rule to set aside a writ of *capias* and *fieri facias*, under which he was arrested for non-payment of one of the fines imposed upon him by the Court. The case was specially referred by the Secretary of State for the Colonies to the Judicial Committee, for their opinion upon the merits.

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In the first instance, the appellant presented a petition to the Judicial Committee for leave to appeal from such orders, which petition alleged, that he was admitted an advocate and attorney of the Courts in Sierra Leone in the year 1849; that in June, 1851, he was retained, in his character of advocate and attorney, by one Patnelli, to commence and prosecute an action against the Hon. Charles Heddle, a merchant of the colony, a member of Her Majesty's Council, and an Assistant Judge of the Courts in the colony, upon a special contract for wages due to Patnelli, as the factor of Heddle; that the defendant having pleaded to the action, it was tried in the Recorder's Court of Freetown, on the 17th and six following days of September, 1851, before the Chief Justice Carr and the Hon. Robert Armstrong, one of the Assistant Judges, and a jury empanelled in the customary manner; that in the course of the trial the appellant, pursuant to notice given to the defendant, called for the production of books of accounts and certain other documents having reference to the matter at issue, but which the defendant refused to produce, upon which the appellant respectfully appealed to the Court to call for and enforce their production, but the CHIEF JUSTICE took no notice of the application, and desired the appellant to proceed with the case, which he did, and brought it to a close; that the advocate engaged on the other

(1) See last page.

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side *having addressed the jury, he began to examine his witnesses, in the course of which he proceeded to put irregular and leading questions to them, whereupon the appellant objected, but the CHIEF JUSTICE told him to sit down, which he was compelled to do ; that the appellant, having cross-examined one of the defendant's witnesses, he was re-examined on fresh matter, to which the appellant objected, but the CHIEF JUSTICE, in a manner which the appellant felt was both uncourteous and arbitrary, desired him to sit down and be silent, which he was compelled to do, to the great injury of his client's case ; that shortly after this circumstance had taken place, the books of the plaintiff were called for, but the appellant declined to produce them unless the defendant's books were also produced, whereupon the CHIEF JUSTICE immediately interposed, and asked the appellant whether he would produce the books, to which he distinctly stated, that he could not give the other side such an unfair advantage ; his Honour continued to put the question, and concluded by saying, " Then do I understand that you refuse to produce the books ? " that a repetition of the same matter occurred over and over again in the course of the trial ; that the appellant made an effort to convince the CHIEF JUSTICE that he was mistaken in his view of the law, and what the justice of the case required, but he was told by the CHIEF JUSTICE " to hold his tongue, and be silent ; " that the appellant then claimed the right of advocating his client's case, and to submit such objections to the Court as he thought were tenable in law, but the CHIEF JUSTICE again desired him " to hold his tongue, and be silent. " *That the defendant's counsel then proceeded to examine his witnesses, and the appellant having again interposed and objected to the questions put as being irregular and improper, he was again desired " to be silent, and keep his seat ; " but claiming and insisting on his right to interrupt the opposite counsel, and prevent his putting leading questions to the witnesses, he was ordered by the CHIEF JUSTICE to be fined in the sum of 20*l.*, for contempt of Court, although, in the painful and trying position in which he was placed, he had not allowed an improper word to escape him, further than to insist upon his right to be heard ; that immediately after this fine was imposed, the CHIEF JUSTICE, seeming to observe that a great many persons in Court felt for and sympathised with the appellant, remarked in a violent tone, that the appellant was acting in such a manner as to induce persons to believe that justice was not likely to be done to his client (which

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the appellant felt was the fact, though he himself had said nothing indicative thereof); but upon the CHIEF JUSTICE so remarking, he could not but assent thereto, whereupon the CHIEF JUSTICE declared him guilty of a contempt of Court, and ordered him to be fined in the further sum of 50*l.*; that the fines having been paid, the trial of the cause proceeded; that the appellant having, in consequence of the refusal on the part of the defendant to produce his books, been compelled to prove by written orders and receipts some of the matters contained in them, the defendant's counsel proposed to produce the books, so originally called for, to displace the case of the appellant's client, to which the appellant objected: but the CHIEF JUSTICE overruled the objection, and refused to permit the appellant to inspect the defendant's *books and the usual entries therein, having reference to the matters at issue; that the appellant insisted he had a right to inspect those entries, but the CHIEF JUSTICE became very violent, and told him he would fine him if he did not sit down, and, being thus coerced, he was under the necessity of taking his seat, to the detriment of his client's case; that the appellant said, he should tender a bill of exceptions, and immediately after entered into conversation with the *Queen's Advocate* (Mr. O'Neill) relative to the question of arbitration, when the Court desired him to be silent, on which the appellant observed that whenever he got up to speak he was interrupted, whereupon the Court fined him 10*l.*; that, owing to these circumstances, the appellant on several occasions excepted to the CHIEF JUSTICE's ruling, but objections were frequently raised by the CHIEF JUSTICE that the appellant's written statements were incorrect and did not agree with his notes; and, in consequence of the frequent observations of the CHIEF JUSTICE, that the appellant had tendered bills of exceptions which were incorrect, the appellant, on the occasion of his excepting to the CHIEF JUSTICE's refusal to allow him to inspect the entries in the defendant's books having reference to the matters at issue, informed the CHIEF JUSTICE that, as it was a very important objection, he would reduce it into writing at once, and the same was handed to the CHIEF JUSTICE, who, in a menacing tone, remarked, that "the paper contained incorrect statements, and that the Court would take notice of it;" that, in consequence, the appellant, on the next day, when an important objection was raised by him, and overruled by the CHIEF JUSTICE, declined to tender any more bills of exceptions, upon which he was requested *to explain what he meant by asserting that he was not allowed to

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tender any more bills of exceptions, when he drew attention to what had occurred on the previous day, and submitted, that it was tantamount to a refusal; thereupon the CHIEF JUSTICE fined him 50*l.* for contempt of Court. That the appellant, not having paid this fine, the CHIEF JUSTICE caused a writ of *capias* and *fieri facias* to be issued for the amount of the fine, upon which he was arrested, but the writ having been issued without a seal, the sheriff discharged him upon an indemnity; that he moved the Recorder's Court for a rule to show cause why the writ should not be set aside as being invalid on the ground of the want of a seal, but the CHIEF JUSTICE refused the rule, and he was obliged to pay the 50*l.* The appellant set out and referred to the minutes of the Court made by the clerk of the Court in respect to these transactions, and submitted that he felt deeply aggrieved by these arbitrary and oppressive proceedings not only in a professional and pecuniary way, but, what was far more important to him, by the imputations which had been cast upon his conduct, and the course of proceedings which had been adopted towards him; the effect of the several orders and proceedings precluding him from the fair exercise of his profession in the Recorder's Court, and made, as he submitted, without any just or proper grounds; that the orders and proceedings were wholly unwarranted, harsh, and oppressive, without proper notice given to him or opportunity afforded him to justify and defend himself, and were a violation of the just rights and privileges of the appellant as an advocate and attorney of the Courts in the colony of Sierra Leone, and tended to impair and bring into disrepute the administration *of justice in that colony; that, until such orders should be formally rescinded by an Order of her Majesty in Council, the reproach which such orders tended to cast on his character, as an advocate and attorney practising in the Courts in the said colony, remained unmoved; and he prayed for leave to appeal from these several orders and proceedings of the Judges of the Recorder's Court at Sierra Leone, bearing date respectively the 19th, 20th, and 24th of September, and also from the decision of that Court in refusing the rule to set aside the writ of *capias* and *fieri facias* of the 30th of October, 1851; and that notice of his petition might be given to the Chief Justice and to the Honourable Robert Armstrong, the Assistant Judge concerned in the orders and proceedings.

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The petition was verified by the affidavit of the petitioner.

Mr. Edmund F. Moore, in support of the petition, cited *Smith v.*

The Justices of Sierra Leone (1), *In re Downie and Arrindell* (2), *Morgan v. Leech* (3), *In re Grant* (4), to show that the Court had jurisdiction to entertain the petition.

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Their Lordships took time for consideration, and on the 19th of February, 1852, delivered judgment by

LORD CRANWORTH :

This petition is presented by William Rainy, a practitioner at the Bar of the Courts in the colony of Sierra Leone, praying for leave to appeal, to enable him to get rid of certain fines which were imposed *upon him by the Court in that colony for contempts of Court. (His Lordship, after stating the facts from the petition, proceeded.) Now it is the opinion, not only of the members of the Committee who heard this petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every court of record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court. The Recorder's Court is created by the Charter of Justice, dated the 17th of October, 1821, and is authorised to hear and determine all civil suits, actions, and pleas which may happen within the colony; and the charter directs, that in all cases where the action would, if the parties were resident in England, be tried by a jury, such action shall be tried before a jury in the Court of the Recorder, according to the practice in England. That being the constitution of the Court, in regard to trial by jury, we are of opinion, that it is a court of record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders. All we can say is, that we have no jurisdiction to entertain such a petition impugning the propriety of such orders, and *praying the remission of the fines. This view is supported by the case of

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(1) 3 Moo. P. C. 361.

(2) *Ibid.* 414.

(3) 3 Moo. P. C. 368.

(4) 7 Moo. P. C. 141.

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Smith v. The Justices of Sierra Leone (1), to which we were referred, in which case the Judicial Committee reversed the orders disbarring a practitioner, but decided that they had no power to remit a fine imposed by a court of record for contempt of Court. But, in the circumstances disclosed by this petition, if her Majesty's Secretary of State think fit to refer the matter to us, we will hear it and advise her Majesty upon the case.

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In consequence of this intimation, the appellant presented a similar petition to her Majesty, through the Colonial Office, setting forth the above facts, and praying that such petition might be referred to the Judicial Committee, in order that the several orders and proceedings made by the Judges of the Recorder's Court at Sierra Leone, bearing date respectively the 19th, 20th, and 24th days of September, 1851; and the decision of the Court in refusing the rule to set aside the writ of *capias* and *fieri facias* of the 13th of October, 1851, might be investigated and inquired into, and that the same might be wholly rescinded, reversed, and expunged from the minutes of the Court, and that the conduct of the CHIEF JUSTICE in the trial might be also inquired into; and that notice of the petition might be given to the Chief Justice, and to the Honourable Robert Armstrong, the Assistant Judge.

The matter was specially referred by the Colonial Office for the consideration of the Judicial Committee to advise the Crown.

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The Chief Justice and the Assistant Justice were *served with a copy of the petition. They transmitted a joint answer which, after setting out their respective appointments as Judges, and the creation and constitution of the Recorder's Court at Sierra Leone (2), they stated, that the orders fining the appellant for contempt of Court were made by them under the following circumstances: That on the second day of the trial in question, the *Queen's Advocate* opened the defendant's case, and, upon his proceeding to examine the witnesses for the defence, the appellant commenced a course of disorderly conduct, and several times rudely and boisterously interrupted the *Queen's Advocate* and *Dougan*, an advocate, in the examination of the witnesses, without any justifiable cause. That the Court, considering these interruptions

(1) 3 Moo. P. C. 361.

(2) The Court of Recorder of Free-town was created by the Charter of Justice, dated the 17th of October, 1821. The Court is empowered to hear and determine all civil suits,

actions or pleas which may happen within the colony. The CHIEF JUSTICE, as Recorder, presides in this Court, and is aided by the Assistant Judges appointed by the Governor, from among the members of Council.

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improper and calculated to withdraw the attention of the jury from the facts of the case, besides occasioning confusion in the Court and preventing the Chief Justice from taking down the evidence, desired the appellant to desist from such a course of proceeding, and to submit, in a proper manner, any objection he had to any question put by the adverse party; but that the admonitions and warnings of the Court produced no effect upon the appellant. On the contrary, in the afternoon of the same day he became very disorderly, and hardly a question could be put but he rudely rose up to object. From disregarding the orders and injunctions of the Court, when *desired to be silent, and desist from those interruptions, the appellant proceeded to reflect on the Bench in language to the following effect: "That greater latitude was allowed to the *Queen's Advocate* than to himself in the examination of witnesses; that the *Queen's Advocate* had it all his own way"—evidently with the view of leading persons to believe that the Court was indisposed to do justice to his client. That the CHIEF JUSTICE, considering that such conduct could not be permitted in a court of justice, consulted with Mr. Armstrong as to the propriety of fining the appellant, but Mr. Armstrong suggested that it would be better to wait until the next day, as the appellant then appeared to be greatly excited, to which the CHIEF JUSTICE assented. That on the following morning not a word of apology, regret, or explanation was offered by the appellant for his conduct in Court on the previous day. That upon the cause being resumed he again rudely interrupted the *Queen's Advocate* and *Dougan* without any justifiable cause, and upon being admonished and desired to be silent, he again, in a disrespectful manner, refused to obey the orders and injunctions of the Court; whereupon, as the repeated warnings and admonitions from the Bench had produced no effect, the respondents felt it to be their duty to impose a fine of 20*l.* on the appellant for contempt of Court. That after the fine had been imposed, the appellant continued to behave in a manner tending to obstruct the due course of the trial; and, perceiving the evil consequences of such conduct in a community such as Sierra Leone, the CHIEF JUSTICE thought it advisable to bring distinctly to the notice of the appellant the effect and tendency of his conduct, in order that he might alter *his bearing and behaviour in the Court, if not intentionally and purposely adopted; the more so, as he had admitted him an attorney of the Court. But, to the astonishment of the respondents, upon the CHIEF JUSTICE

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observing that the conduct of the appellant was calculated to lead persons to believe that justice was not likely to be done to the plaintiff, the appellant, in a manner insolent and disrespectful, and while seated in his chair and with a grinning countenance, immediately replied aloud to the statement from the Bench, "I can very well see that." Thereupon the Court called for an explanation or an apology, which the appellant pertinaciously refused; and the Court, considering that his conduct and bearing had been purposely adopted, and, if unchecked, was calculated to produce the most pernicious consequences in the colony, felt it to be an imperative duty to impose a further fine of 50*l.* for contempt of Court. They denied the statement of the appellant that the fine of 20*l.* was imposed on him for objecting to any leading questions put by the opposite counsel, and alleged, that the remark of the CHIEF JUSTICE was not made in a violent tone, nor made immediately after the fine was imposed. That neither of the respondents observed persons in Court feeling for or sympathising with the appellant, and they did not believe that any person who had a proper sense of what was due to a court of justice could have felt any sympathy for him when the fine was inflicted. That the statements in the petition, in relation to the books of accounts of the parties to the suit, were gross misrepresentations of the conduct of the Court and of the facts as they occurred. That the Court had no power to enforce the production of the defendant's private *books of account, on a notice to produce during the progress of a trial: *Habershon v. Troby* (1). That at the opening of the Court on the morning of the 20th of September, the appellant voluntarily brought into Court the amount of the fines imposed on him the previous day, and paid the same to the clerk of the Court, telling him to count it. That subsequently to the imposition of the last of the two fines, the appellant declared aloud in the Court "that the Court might fine him as often as it pleased, but that he would get justice elsewhere," and continued to behave in an insolent and disrespectful manner in the Court. That in the afternoon of that day the appellant commenced an altercation with the *Queen's Advocate*, alleging that he had offered to settle the action by arbitration, which had been refused, and the CHIEF JUSTICE, considering it right to put an end to it, there being no question of arbitration before the Court, mildly called out, "Mr. Rainy," with the view of gaining his attention, whereupon the appellant

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sharply and abruptly turned round, and, addressing the Bench, said, in a rude and insolent manner and with a scornful look, "Whenever I get up to speak I am interrupted; I am speaking to the *Queen's Advocate*," on which the Court thought it to be their duty to impose a further fine of 10*l*. That on the 24th of September the appellant stopped in his cross-examination of a witness, and expressed himself to the Court to the effect, "that he was not allowed to tender any more bills of exceptions." As the Court had never refused any bill of exception from him, the CHIEF JUSTICE requested an explanation, and inquired whether the bill of exception he referred to was the one he tendered at the opening of the Court yesterday. *The appellant replied he would not answer the question until he was called upon by a rule to show cause. The question was repeated, and the appellant, who as an officer of the Court was bound to answer, continued pertinaciously to refuse, and then took up his hat and said, "he was ready to go to gaol and put an end to the trial;" the respondents then felt it their duty to impose a further fine of 50*l*. That the allegation that the appellant was not allowed to tender bills of exceptions was wholly gratuitous and unfounded in fact, and after the occurrence to which it had reference (of which an explanation was given) he tendered other bills of exceptions, which were received by the Court. The answer of the Judges then further alleged, that the appellant had made misrepresentations of what had occurred in Court. That the minutes of the Court, made by the clerk of the Court, to which the appellant referred in his petition, were distinct from the acts of the Court, and conveyed no idea of the boisterous and disorderly conduct and demeanour of the appellant. That the issuing the writ without seal, and refusal to grant a rule to set aside the writ of *capias* and *feri facias*, was justified in the circumstances. And they finally submitted that the orders were fully justified by the conduct of the appellant to the Court, in support of which they referred to *Rex v. Davison* (1), *Carus Wilson's case* (2), 2 Hawkins, 211, note (1), 8th edit. by Curwood, 2 Strange, 1197, 4 Stephen's Blackstone, pp. 348, 352, *Levy v. Moylen* (3), and prayed that the petition and appeal might be dismissed.

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Affidavits were filed on both sides in support of the *respective cases of the appellant and the respondents, the Judges. These

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(1) 23 B. R. 295 (4 B. & Ald. 329).

(3) 1 L. M. & P. 307.

(2) 68 R. R. 626 (7 Q. B. 984).

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affidavits were made by parties present at the trial of *Patnelli v. Hedde*, and were contradictory: on the one hand, the conduct and bearing of the appellant was stated by some of the witnesses to have been irritating, violent, and disrespectful to the Court; while, on the other hand, it was sworn that the behaviour of the CHIEF JUSTICE at the trial towards the appellant was very violent, harsh, and unfeeling, and that the conduct of the appellant was becoming and proper. The appellant also filed a further affidavit himself, in reply to the Judges' case, denying the material statements made by them with regard to his demeanour at the trial.

The case now came on for hearing.

Mr. Whateley, Q.C., and *Mr. Edmund F. Moore*, for the appellant,

argued, that the infliction of fines amounting to 150*l.* upon the appellant, in a colony where a practitioner could not realise by his professional exertions more than 500*l.* a year, was a harsh and unjust exercise of the authority of the Court; that, although every respect was due to a Judge in the administration of justice, yet it was equally important that the Judge should respect the character of the Bar, and that they should not be curtailed in the fair exercise of their duties; that there was no such offence committed as properly constituted a contempt of Court, for there was nothing either irregular, improper, or offensive in the conduct of the appellant towards the Court, in urging his objections to the ruling of the Court upon questions of law. That it was charged by the petitioner, and not denied, that the CHIEF JUSTICE had *used certain insulting expressions to the petitioner, such as, "to hold his tongue and be silent," "to be silent and keep his seat;" and that such conduct by a Judge tended to bring courts of justice into disrepute.

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Mr. W. H. Watson, Q.C., and *Mr. Lush*, for the Judges,

submitted, that the fines were properly imposed by a competent Court for contempts committed by the petitioner at the trial: *Rex v. Davison* (1); that what constituted a contempt was a matter which the Court at Sierra Leone were alone competent to judge: *Carus Wilson's* case (2); that the orders imposing the fines were fully justified by the conduct of the appellant towards the

(1) 23 B. R. 295 (4 B. & Ald. 329). (2) 68 B. R. 626 (7 Q. B. 984—986, See also *Rex v. Almon*, Wilmot's 1013).
Opinions, pp. 243, 256, 263.

Court, and to alter or rescind them would impair the authority of the Court in the administration of justice; they further contended, that fines imposed by a court of record, like the Recorder's Court at Sierra Leone, for contempts, could not be remitted: *Smith v. The Justices of Sierra Leone* (1); and insisted, that if such fines were remitted, it would be impossible for the CHIEF JUSTICE to remain in office.

Mr. Whateley, in reply:

This is not a regular appeal impeaching the legality of orders imposing fines, but a matter specially referred by the Crown to this Committee to advise upon the whole case as to the propriety of the Judges making such orders.

THE RIGHT HON. DR. LUSHINGTON:

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It is not customary in cases referred to us like the present, to deliver the opinion of their Lordships until their report has been approved by her Majesty.

No opinion was given by the Committee, but the report of the Committee on the petition, recommended the reduction of the fines to the sum of 60*l.*, which report was approved of by her Majesty in Council. No order was made as to costs.

ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

QUANE *v.* QUANE.

(8 Moore, P. C. 63—74.)

1852.
June 14.

[Customary law of the Isle of Man as to legitimation by subsequent marriage.]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

VAUX *v.* SHEFFER.

THE SHIP "IMMAGANDA SARA CLASINA."

(8 Moore, P. C. 75—89.)

1850.
Dec. 16.
1852.
Feb. 18, 19.

[Admiralty rule as to apportionment of damages where both vessels are in fault.]

(1) 3 Moo. P. C. 361.

ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

1852.
April 2.
1854.
Feb. 9, 10, 11.

MUSADEE MAHOMED CAZUM SHERAZEE v.
MEERZA ALLY MAHOMED SHOOSTRY AND
BEBEE MARIAM BEGUM.

(8 Moore, P. C. 90—115.)

A deed of sale conveying real estate, the property of a defendant in a suit then pending in the Supreme Court at Bombay: Held, in the absence of satisfactory evidence of a *bonâ fide* consideration having been paid by the vendee, to be fraudulent and void, as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration.

Held, also, that a party in possession under such a deed was not entitled to any allowance for sums expended by him for improvements upon the estate.

A sequestrator in possession is not to be disturbed by a claimant, without leave of the Court. The usual mode is to apply for permission to bring an action of ejectment, or to examine, *pro interesse suo*.

Under a writ of sequestration the sheriff seized a moiety of an estate in the possession of A.; A. presented a petition to the Court, entitled in a cause then pending, claiming the land under a deed of sale executed by the defendant, *pendente lite*, praying to be put in possession, and to be allowed to go before the Master and examine witnesses, *pro interesse suo*. Proceedings were taken under this petition before the Master, but afterwards it was agreed by consent, that the matter of the petition should be tried by the Court, and the witnesses examined *vidâ voce* by the Court at the hearing of the cause in which the petition was entitled. Held, that there was nothing irregular in such a mode of proceeding.

By the constitution of the Supreme Courts in India, the Judges for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decision of the Judges, in such circumstances, as to the verdict of a jury in this country in which the Judge who tries the cause makes no objection.

Semble. This Court will not disturb a judgment of a Court in India upon a question of the credibility of witnesses; unless it is manifestly clear from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence.

ON PETITION FROM MADRAS.

IN RE RAJAH VASSAREDDY LUTCHMEPUTTY
NAIDOO.

(8 Moore, P. C. 115—137.)

1852.
June 16.
July 5.

[Case of purely Indian interest: refusal of Sudder Court to execute Order in Council confirming report of Judicial Committee, on ground of alleged paramount title: peremptory order issued.]

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.
 RICHARD HILL AND OTHERS *v.* THE QUEEN.

(8 Moore, P. C. 138-156.)

[Appointment to and tenure of office in Jamaica.]

1852.
 July 19.
 1854.
 Feb. 20.

ON APPEAL FROM NEWFOUNDLAND (1).
 EMERSON *v.* THE JUDGES OF THE SUPREME
 COURT OF NEWFOUNDLAND (2).

(8 Moore, P. C. 157-167.)

1852.
 Nov. 29.
 1854.
 Feb. 16.

An order *nisi* for striking an attorney and practitioner of the Court of Newfoundland off the rolls of that Court, unless cause to the contrary should be shown in four days, made absolute upon no cause being shown, notwithstanding an application made by him for enlargement of time to enable him to prepare his defence, reversed by the Judicial Committee as being irregularly and improperly made by the Court.

Rt. Hon. T.
 PEMBERTON
 LEIGH.
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THE appellant in this case was an attorney and practitioner of the Supreme Court at Newfoundland. He had been admitted in 1825, and had filled continuously for twenty years, the office of *Solicitor-General* of the colony, and held that office at the date of the orders complained of. The appeal was brought against a rule absolute, dated the 10th of April, 1852, made by the Judges of the Court of Newfoundland, striking the appellant off the roll of attorneys of that Court.

The circumstances under which this rule was made were these :

In the year 1835, the appellant was instructed by a person named Grealy, to recover the sum of 76*l.* 19*s.* 8*d.* currency, from one Henderson, the surviving partner of the firm of Jordan and Henderson, *and a judgment was obtained by him for that amount. In the year 1850, Grealy presented a petition to the Supreme Court of Newfoundland, stating, that the appellant had been employed as his attorney against Henderson in the year 1835, that judgment was passed in his favour for the amount sued for, and that he believed the whole sum and costs had been paid to the appellant by the firm of Robinson & Co., being freight due to the brig *Elizabeth* ; that he received from the appellant the sum of 24*l.* only, and that 52*l.* 19*s.* 8*d.* was still due to him from the appellant ;

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(1) Present: The Right Hon. Dr.
 LUSHINGTON, the Right Hon. T. PEM-
 BERTON LEIGH, the Right Hon. Sir
 EDWARD RYAN, and the Right Hon.

Sir JOHN PATTESON.

(2) Cited, *Newton v. Judges of the
 High Court, N. W. P.* (1871) I. R.
 4 P. C. 18, 24.

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that he had frequently applied to him for it without any satisfaction, and had been at last recommended to apply to the Court for redress. Grealy filed an affidavit in support of his petition. The Court directed the appellant to answer the petition on oath. In answer to this petition, the appellant filed an affidavit, admitting having been employed as alleged, and having recovered some money, but stating that he had not the least recollection of the amount so recovered, nor could he ascertain it, inasmuch as all his books and papers had been lost in a fire which consumed his dwelling-house in 1847; that whatever amount he had recovered for Grealy he had paid over to him, and had taken his receipt, but which receipt was also burned; that from that time till this petition, he had never heard of the subject. Grealy filed an affidavit in reply, stating that he had applied personally many times to the appellant for the money, and that the appellant always promised to pay him.

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When the case came on before the Court, the appellant pressed upon the Court the hardship of being called upon to answer a charge after fifteen years, when all his papers were destroyed, and no demand *had been made upon him during that period. The Court made an order dismissing the petition, but without prejudice to any action which the petitioner might hereafter bring against the appellant, on terms that the appellant was, within one week, to file an undertaking not to plead or rely upon the Statute of Limitations in such suit, otherwise the petitioner was to be at liberty to proceed to trial upon this issue, namely, whether the appellant, as attorney for the petitioner in the action against Henderson, did receive, in the said cause, or under any writ, process, or judgment therein, any and what sum of money over and above the sum he paid to the petitioner, and which ought to have been paid to the petitioner on account thereof, with liberty for plaintiff and defendant to be examined at the trial. The appellant declined to file the undertaking, and an action was thereupon commenced against him, and a declaration delivered therein upon the feigned issue directed by such order. The appellant pleaded the Statute of Limitations, but the Court ordered the plea to be taken off the file with costs. The feigned issue was tried in December, 1851, when the jury made the following special verdict: "There is no satisfactory evidence to show the amount received out of the freight of the *Elizabeth*, on the execution of *Grealy v. Henderson*; but it appearing to the jury, from the amount of freight

stated to be earned by the *Elizabeth*, after allowing reasonable disbursements, there should have been sufficient to satisfy the execution, or, if otherwise, there was property by which the amount might have been recovered, as appears by the satisfying of a subsequent execution against the said Henderson at the suit of H. A. Emerson, Esq. ; *the jury, therefore, find a special verdict for the plaintiff, 52*l.* 19*s.* 8*d.* currency." The appellant then moved the Court to have the verdict entered for him on the ground of the finding of the jury being in law a verdict for the defendant, or that the verdict should be set aside and a new trial granted ; but the Court refused both applications, and discharged the rule *nisi* obtained on behalf of the appellant.

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The appellant then desired an investigation of the accounts of Henderson's estate, by which it would appear what sums he had actually received from the freight of the *Elizabeth*, and for that purpose filed a petition against the administratrix of Jordan Henderson, and made an affidavit in support of it ; and the Court afterwards made an order calling upon such administratrix to file an inventory and account of the estate and effects of her deceased husband. In the meantime, Grealy applied to the Court for an order against the appellant for payment of the amount of the verdict, with interest, and whilst this application was being argued, the sheriff brought into Court the writ book, in which he discovered certain entries of proceedings in the cause of *Grealy v. Henderson*, by which it appeared, that the appellant had issued an attachment against the vessel *Elizabeth* for 20*l.* 0*s.* 2*d.* sterling, the debt due to Grealy, and that the demand had been satisfied. Upon this discovery, the appellant, being advised of his inability to produce any documentary evidence, in consequence of the entire destruction of his books and papers, or to afford any conclusive explanation, in consequence of the great lapse of time, the event occurring so long previous, paid, under protest, Grealy's claim and costs.

Upon the Court being informed that the matter was *disposed of, the CHIEF JUSTICE observed, that the Court would give judgment in the matter on the following morning. Accordingly, on the next morning (the 6th of April,) the Chief Justice BRADY delivered a written judgment, which did not contain any decision of the Court on the matters formerly at issue in the cause of *Grealy v. Emerson*, but consisted of a long and elaborate review of the course taken by the appellant in reference to the petition of Grealy, and the proceedings subsequent to the filing thereof ; and the judgment

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concluded by ordering the appellant to show cause, in four days, why he should not be struck off the rolls of the Court. It did not appear that any notice had been given of the intention of the Court to give such judgment, nor had any motion, application, or complaint been made by any person whatever to the Court against the appellant in reference to his conduct.

The appellant was served with the rule to show cause on the same evening, and he applied on the next day but one following for inspection of the documents on which the judgment was founded, and also for a copy of the judgment, to enable him to prepare his defence, but was unable to obtain them, as he was informed that the papers were with the Chief Justice, and would not be returned to the office till the 9th or 10th of the month.

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The appellant thereupon made an affidavit of the facts with reference to his application to inspect the papers, that he had not, up to the morning of the 10th of April, the day on which the rule was returnable, seen the papers, and had not time since the service of the rule to make the necessary preparations for his defence in a matter so vitally important to him ; *and upon the rule being called upon, on the 10th of April, which was the last day of Term, he moved for an enlargement of the rule until the first day of the next Term, to afford him time to prepare his defence, and urged that, according to the law and practice of the Court, it was not competent for the Court to call upon an attorney to answer, or for the Court to discuss such a rule, upon the last day of Term.

At half-past three o'clock of the same day, the CHIEF JUSTICE refused to grant such enlargement, and stated that, unless cause was shown before the rising of the Court on that day, the rule would be made absolute. Shortly after five o'clock in the afternoon of that day the CHIEF JUSTICE called upon the appellant's counsel to show cause against the rule, when he informed the Court that he could not show cause, as he was not prepared to do so for want of time to prepare his defence, when the CHIEF JUSTICE ordered the rule to be made absolute, and immediately adjourned the Court.

On the 19th of the same month the appellant applied to the Court for leave to appeal to her Majesty in Council, which was refused by the Court, on the ground, that the charter constituting the Supreme Court did not authorise them to permit an appeal in such a case.

The appellant then petitioned her Majesty in Council for leave to appeal from such order.

Mr. Montague Smith, in support of the petition, cited *Smith v. The Justices of Sierra Leone* (2).

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Leave to appeal was granted upon the appellant giving security for costs.

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The Judges were served with notice of the appeal, and a case was put in for them as respondents, by the solicitors of the Treasury, signed by the law officers of the Crown, by which it was submitted that, for the reasons set forth in the judgment of the Court, the rule or order absolute was rightly made, and ought not to be set aside.

The appeal now came on for hearing.

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Mr. Montague Smith, Q.C., and *Mr. Coleridge*, for the appellant :

Nothing can be more repugnant to justice, or prejudicial to the appellant's character, than the course pursued by the Court. In the first place, the proceedings were most irregular, for they originated at the instance of the Court itself, a course contrary to the practice of Courts in this country, where if any charge be brought against an officer of the Court, the Court directs a proper person to apply for a rule, and the matter is never mentioned by the Court until it comes before them for full discussion.

(SIR JOHN PATTESON : It does not appear that any motion had been made for a rule to strike him off the rolls.)

None; it was the act of the Court alone. The appellant is here charged with having recovered and received a sum of money, and with having withheld it from his client; appropriating it to his own use—a charge involving gross professional misconduct. And upon a charge so grave against the *Solicitor-General* of the colony, the Court *ex mero motu*, take proceedings against him for the purpose of striking him off the rolls, which proceedings, we submit, are oppressive *and unjust. The appellant was not allowed by the Court sufficient time to prepare his defence to the charges brought against him. The Judges, from some cause, were prejudiced against the appellant, and prejudged the case against him. They delivered a

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(1) Present: Lord CRANWORTH, the Hon. Sir EDWARD RYAN, and the Lord Justice KNIGHT BRUCE, the Right Right Hon. Sir JOHN PATTESON.
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written judgment previously prepared, without any notice to him, and without calling upon him for his defence. He applied for an enlargement of the rule to enable him to prepare his defence, which the Judges refused, under circumstances which, in any case, would be harsh and unjust. Such a sentence, in the absence of any sufficient grounds to sustain it, cannot, we submit, be allowed to remain, but must be reversed, and the appellant restored to the rolls of attorneys of the Court.

The *Attorney-General* (Sir A. Cockburn), with whom was Mr. Welsby, for the respondents :

I do not appear to support this judgment: the duty of the *Attorney-General*, on behalf of the Crown, is to render assistance to the Court in arriving at a conclusion which will do justice to the parties most concerned. On behalf of the Crown, I beg to express a strong and unqualified opinion that the judgment cannot stand, and ought to be reversed, as the appellant, whose interests are so materially involved in the decision, has had no opportunity afforded him by the Court below to answer the charge preferred against him.

Their Lordships, without calling for a reply, delivered judgment, as follows, by

THE RIGHT HON. T. PEMBERTON LEIGH :

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This case comes before their Lordships in a very *singular position, for, the appellant having prayed that certain orders of the Court below might be reversed, and the Judges who pronounced those orders being named as respondents to the appeal, and having, by the printed case which they have put in, insisted that those orders were perfectly correct, it now appears that the *Attorney-General* and the law officers of the Crown are of opinion, being instructed on behalf of the Crown, that those orders, which the respondents' case insists are perfectly correct, are, in point of fact, not capable of being maintained. We must consider that this case comes before us on an opportunity given to the Judges, if they thought fit, to appear. They were served with notice, and notice was also given to the Secretary of State, and we think that we must consider that the law officers of the Crown appear here on behalf of the Crown, as instructed by the Secretary of State, and that if the Judges of Newfoundland had wished to appear and support this judgment, they could and would have done so.

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All their Lordships have to determine on the present occasion is, whether the two orders complained of have been regularly and properly pronounced or not. By one of these orders the appellant is to be struck off the rolls of the Court within four days, unless in the interval he showed cause to the contrary, and by the second of these orders, no cause having been shown, the conditional order is made absolute, and he is struck off the rolls.

Now the sole question which their Lordships have to consider is, not whether there were circumstances in this case which might require explanation on the part of the gentleman against whom these proceedings were directed, but whether, supposing such a *case to exist, the course which was taken by the Court was a regular and proper course, or not. Now it is impossible to dissent from the observations which have been made at the Bar, that the course which was taken, in pronouncing the order in the first instance, that he should be struck off the rolls unless he showed cause, was, to a certain degree, and indeed to a very great degree, prejudging the case, supposing that case ever was brought forward. Again, the order making absolute that order which was originally conditional, and refusing this gentleman any opportunity of giving an explanation, if explanation was required, was a proceeding, as it appears to their Lordships, which it is impossible to uphold.

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The course which was taken was irregular also, as it appears to their Lordships, in another particular. There was an application for a new trial in a case pending between two parties in an action of debt, at least the case was for the recovery of a debt against an officer of the Court. In that proceeding an issue had been directed and tried, and an application was made for a new trial of that issue; but before that motion had been disposed of, the matter was settled. The proper course, therefore, would seem to have been to have discharged the rule with costs, as the cause was at an end. If, in the course of those proceedings, anything appeared to the Court in the conduct of one of its officers which required that an explanation should be given, in order that it might be seen, whether there was any necessity for a further and severer proceeding against him, their Lordships are of opinion, that that ought to have been the subject of a separate and distinct application; that notice should have been given to this gentleman that an explanation was required by the Court in those circumstances, *and that upon that explanation not being sufficient, the proper course would have been that some person should have been

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instructed on behalf of the Crown to apply to the Court for a rule for this gentleman to show cause why further proceedings should not be taken. Their Lordships are unanimously of opinion, that the course which was taken was one which cannot be sustained; and it is upon these grounds, without saying anything upon the one hand, or the other, as to the suspicion which does or not attach to this gentleman, that their Lordships are of opinion, that the orders which have been pronounced cannot be maintained, and that we must advise her Majesty to set them aside.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

1854.
July 13.

VALENTINE AND OTHERS *v.* CLEUGH.

THE "TELEGRAPH."

(8 Moore, P. C. 167—178.)

[Construction of navigation laws, since repealed.]

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

1852.
Nov. 29.

SMITH *v.* DEIGHTON.

(8 Moore, P. C. 179—189.)

It is essential to the validity of a church rate, that the notice required by the statute, 58 Geo. III. c. 69, s. 1, summoning the parishioners together, should clearly apprise them of the special purpose for which the vestry meeting is to be called.

[Compulsory church rates were abolished by the Compulsory Church Rates Abolition Act, 1868 (31 & 32 Vict. c. 109). And see Local Government Act, 1894, s. 51.]

ON APPEAL FROM THE COURT OF CHANCERY, IN JAMAICA.

1853.
Feb. 2.

WILLIAM BALFOUR AND OTHERS *v.* ELIZABETH
WATT AND OTHERS.

(8 Moore, P. C. 190—202.)

[Construction of colonial statute.]

ON APPEAL FROM THE SUPREME COURT AT CEYLON.

REG. *v.* WILLIAM NICHOLAS PRICE, JAMES
SMITH, AND GEORGE STEWART.

(8 Moore, P. C. 203-216.)

[Construction of local ordinance.]

1853.
Feb. 2.
1854.
Feb. 17.

IN RE HEATH'S PATENT.

(8 Moore, P. C. 217-226; S. C. 2 Web. P. C. 247.)

1853.
Feb. 1, 8.

The circumstance of there being *lis pendens*, respecting the validity of the letters patent, is no objection to the grant of an extension of the original letters patent.

Term of letters patent extended for seven years on the ground of the meritorious nature of the invention, and the extensive litigation the patentee had been put to in protecting his patent rights which had prevented any remuneration.

Form of Order in Council, pursuant to the statute, 15 & 16 Vict. c. 83, s. 40, directing the Lord Chancellor to make and seal new letters patent, upon the report of the Judicial Committee recommending an extension of the term, under the provisions of the statutes, 5 & 6 Vict. c. 83, and 7 & 8 Vict. c. 69.

No accounts were kept by the deceased patentee of the expenditure or receipts, on account of his patent. Upon its appearing that his estate was of little value (his effects being sworn for administration under 100*l.*) the petitioner, the administratrix of the patentee, on the allegation that there had been no profits, but considerable loss, to such estate, was examined to prove that fact.

[The power to grant extension has been transferred from the Privy Council to the High Court. See now Patents and Designs Act, 1907, s. 18.]

ON APPEAL FROM THE COURT OF APPEALS IN CANADA.

JOHN POLLOK AND OTHERS *v.* WILLIAM BRAD-
BURY.

(8 Moore, P. C. 227-266.)

[Local bankruptcy law.]

1853.
Feb. 3, 4.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (1).

MURROW *v.* STUART (2).

(8 Moore, P. C. 267—276.)

1853.

Feb. 3.

SIR JOHN
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Bill of exchange drawn by M., under the name of M. & Co., upon and accepted by J. & Co., payable six months after sight to order of M., and by M. indorsed to B., and by B. indorsed to C., “value in account with the Oriental Bank,” and by C. indorsed to S.

Action by S., as indorsee, against M., as drawer, upon the bill being dishonoured. Demurrer that the indorsement preceding that to S. was restrictive: Held by the Supreme Court of Hong Kong, that there was nothing upon the indorsement by B. to preclude C., the restricted indorsee, from making an assignment of the bill, so as to give the subsequent indorsee a right of action for the benefit of the restraining indorser, or *cestui que trust*, as the case may be. Such decision on appeal, affirmed by the Judicial Committee of the Privy Council.

THIS was an action brought by the respondent, as indorsee, against the appellant, as drawer, of a bill of exchange for 1,154*l.* 15*s.* 7*d.* The bill was drawn by the appellant, under the name and style of “Murrow & Co.,” upon and accepted by Messrs. Johnson, Cole & Co., payable six months after sight to the order of the appellant, and by the appellant indorsed to one Burn, and by Burn indorsed to W. W. Cargill, “value in account with the Oriental Bank,” and by Cargill indorsed to the respondent. Burn was the manager of the Bank at the time of the indorsement to him, and the respondent was the manager at the time of the indorsement to him.

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The declaration stated, that Stuart (the plaintiff), the manager of the Oriental Banking Company, *carrying on business in Victoria, in the colony of Hong Kong, complained of the defendant in an action on promises; for that the defendant, using the name and style of “Murrow & Co.,” on the 23rd of April, 1847, made his bill of exchange, and directed the same to Messrs. Johnson, Cole & Co., and thereby required them, six months after sight, to pay to Messrs. Murrow & Co., or order, 1,154*l.* 15*s.* 7*d.* value received, and place the same to account of shipment of rhubarb. That Messrs. Johnson, Cole & Co. accepted the bill, and that the defendant indorsed the bill to H. P. Burn, manager, who afterwards indorsed the same to one W. W. Cargill, “value in account with the Oriental Bank,” who indorsed the same to the plaintiff, and, after averring

(1) Present : The Lord Justice KNIGHT BRUCE, the Lord Justice TURNER, the Right Hon. Dr. LUSHINGTON, the Right Hon. Sir EDWARD RYAN, and the Right Hon. Sir JOHN

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(2) Foll. *Buckley v. Jackson* (1868) L. R. 3 Ex. 135, 18 L. T. 886; and see Bills of Exchange Act, 1882, s. 35 (1).

dishonour, and due notice, assigned for breach the non-payment by the defendant.

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To this declaration the defendant filed a general demurrer, the point stated in the margin being, that the indorsements preceding that to the plaintiff were restrictive.

The plaintiff having joined in demurrer, the case was argued on the 3rd of October, 1851, before the Supreme Court.

The defendant, upon the argument on the demurrer, finally relied upon two objections: First, That the plaintiff sued in a representative capacity, as manager of the Oriental Bank, and that an action in that capacity could not be sustained upon a cause of action accruing in right of the indorsement of a bill to him in his individual capacity. Second, That the indorsement to W. W. Cargill, "value in account with the Oriental Bank," was restrictive; and that W. W. Cargill appeared by the declaration to be incapable *of conferring any title to the bill by indorsement.

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The COURT reserved judgment, which was afterwards pronounced, on the 1st of November, 1851.

[It is thought needless to reprint the judgment of the Court below.]

Against this judgment the present appeal was preferred.

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The appeal raised two questions: first, whether the indorsement to Cargill, "value in account with the Oriental Bank," was a restrictive indorsement; and secondly, whether Cargill did not appear by the declaration, to be incapable of conferring any title to the bill by indorsement to the respondent.

Mr. Serjeant Byles, and Mr. Field, for the appellant; and

Mr. Serjeant Channell, for the respondent.

It was contended by the appellant: First, that the words "value in account with the Oriental Bank" expressed a trust for the Oriental Bank, and showed Cargill to be a mere agent to receive for the benefit of the Oriental Bank; and, secondly, that the indorsement of such an instrument to Cargill in trust for the Bank being restrictive, destroyed the negotiability of the instrument, and conferred upon *Cargill no power of indorsing the instrument so as to give a right of action to any one.

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On the part of the respondent it was submitted, that the propositions urged by the appellant were untenable, as the words "value in account with the Oriental Bank" did not necessarily

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import that the Bank had the beneficial interest in the bill; although, in point of fact, the Bank were the beneficial owners, and the action was brought by the respondent on behalf of the Bank. And also, that the second ground was unsustainable, as the very object of the trust would be defeated, if the trustee was not permitted to indorse over the bill; as there was no reason why the trustee, on the ground of some danger to his cestui que trust, which could only exist if the trustee be dishonest, should be shorn of the ordinary power of transfer, which belonged to the holder of a negotiable instrument. And lastly, that the declaration showed a good cause of action by the plaintiff, as indorsee, against the defendant as drawer of the bill.

The following authorities were referred to upon these points: *Evans v. Cramlington* (1), *Cramlington v. Evans* (2), *Cox v. Troy* (3), *Ancher v. The Bank of England* (4), *Edie v. The East India Company* (5), *Treuttel v. Barandon* (6), *Snee v. Prescott* (7), *Sigourney v. Lloyd* (8), Byles "On Bills of Exchange," pp. 108—109, 114 (9), Chitty "On Bills of Exchange," p. 232 (10).

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SIR JOHN PATTESON :

Their Lordships are of opinion that there is no doubt at all upon this point. The words "value in account with the Oriental Bank" is not such a restrictive indorsement as precluded the plaintiff from suing upon this bill. If the parties meant to make a restrictive indorsement, they should have stated it in plain and intelligible language. The appeal must be dismissed with costs.

ON PETITION FROM THE SUPREME COURT AT CALCUTTA.

IN RE SIBNARAIN GHOSE.

(8 Moore, P. C. 276—281.)

1853.
Feb. 8.

Where this Court grants leave to appeal, under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying as the special circumstances of the case require.

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| (1) Carth. 5. | (6) 19 R. R. 472 (8 Taunt. 100). |
| (2) 2 Vent. 296. | (7) 1 Atk. 249. |
| (3) 24 R. R. 460 (5 B. & Ald. 474). | (8) 32 R. R. 504 (8 B. & C. 622). |
| (4) Doug. 637. | (9) 5th edition. |
| (5) 2 Burr. 1216; S. C. 1 W. Bl. 295. | (10) 9th edition. |

IN RE BODMER'S PATENT.

(8 Moore, P. C. 282—288.)

1853.

April 12, 13.

Where letters patent (for improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, and rolling metals) embraced several subjects, one only of which, namely, the rolling of metals, had been worked out, and that part of the patent was affected by subsequent patented improvements by the same patentee, and could not be effectually used without such subsequent improvements; the Judicial Committee, before recommending an extension of the term of the first patent, put the petitioner upon terms of disclaiming all the parts of the original patent not worked out, and restricted the prolongation to the unexpired term of the subsequent patents.

[See now Patents and Designs Act, 1907, s. 18.]

ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLAND OF
BARBADOES.CHARLES TURNER AND OTHERS *v.* THOMAS FRANCIS
COX AND OTHERS.

1853.

April 13, 14.

(8 Moore, P. C. 288—318.)

[THE only point of general interest in this case is sufficiently stated in the first paragraph of the opinion delivered by KNIGHT BRUCE, L. J., as follows:]

Three points have been made in support of this appeal, as to two of which their Lordships did not think it necessary to hear the respondents' counsel. Of those two, one was the question of the effect of the will of an obligee in a bond making the obligor his executor; and it was contended that the effect, though not to destroy the debt, was to take away priority from it, as a specialty debt. We are dealing with this question only as an equitable question; the law of the case, therefore, is, on the present occasion, immaterial; and their Lordships are of opinion, that in equity, and, therefore, in substance, the debt remained exactly as it was, exactly as it would have done, if a stranger had been the executor.

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ON APPEAL FROM THE SUPREME COURT AT CALCUTTA (1).
**MUTTYLOLL SEAL v. LAUNCELOT DENT AND
 OTHERS (2).**

(8 Moore, P. C. 319—351.)

1853.
 May 10.

SIR JOHN
 JERVIS.

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Where bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realised by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the COURT at Calcutta) that the remitter was entitled to recover the value of the bills in assumpsit, upon an *indebitatus* count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent.

THIS was an action of assumpsit, brought by the respondents, merchants at Hong Kong, against the appellant, a banker and merchant at Calcutta, to recover the value of six bills of exchange.

The plaint contained six counts. The two first counts were upon a guarantee (these counts were abandoned at the trial), the third count was an *indebitatus* count, as follows: that the defendant was indebted to the plaintiffs in Rs. 80,000, the price and value of divers goods and securities for money, to wit, six bills of exchange, for the payment of divers large sums of money, to wit, 6,000*l.* of British money, of great value, to wit, of the value of Rs. 80,000, by the plaintiffs, sold and delivered to the defendant, at his request. The fourth count was for money had and received by the defendant to the use of the plaintiffs; the fifth count was for interest, and the sixth *count was on an account stated. To this plaint the defendant pleaded six pleas. The first was *non assumpsit* to the whole plaint. The remaining five pleas were all pleaded to the two special counts upon the guarantee.

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The facts of the case, as they appeared in evidence at the trial, were these: The appellant was the Banian of Oswald, Seal & Co., who carried on business as merchants at Calcutta, and had dealings with the respondents; the appellant supported that firm with his credit, and with funds provided by him, having supplied a portion of its capital, and being in the habit of making advances to it from time to time, to enable it to meet its engagements. His son, Heeraloll Seal, was a partner and member of the firm of Oswald, Seal & Co.; and the appellant was well acquainted with its affairs

(1) Present: The LORD CHIEF JUSTICE of the Common Pleas (SIR JOHN JERVIS), the Right Hon. Dr. LUSHINGTON, the Right Hon. Sir EDWARD

RYAN, and the Right Hon. Sir JOHN PATTESON.

(2) See Bills of Exchange Act, 1882, s. 21 (2).

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and transactions. In the year 1845, he had given to the house of the respondents, as it was then constituted, a guarantee for the due investment and employment of such funds as might be entrusted by them to the firm of Oswald, Seal & Co., for the purchase of opium, and had engaged to promote the trade of the respondents' house, on condition that they reciprocally promoted that of Oswald, Seal & Co.; and, at the time of the transaction in question, as well as subsequently, that firm was very largely indebted to the appellant. On the 29th of October, 1847, the respondents transmitted to the firm of Oswald, Seal & Co. the bills of exchange, which were the subject of the action, with a letter, which was in part as follows: "By our No. 19, we remit you 10,000*l.*, to be passed to credit to our opium account. We have now the pleasure to enclose the under-mentioned bills on *England, which please realise to credit of the same account. Dated Hong Kong, 27th October, 1847, drawn by ourselves on G. T. Braine, Esq., in our own form and blank endorsed." Then followed the particulars of the bills for 6,000*l.* It then proceeded: "We now give you an order for a further quantity of Bengal opium, to be purchased at the second sale, say about fifty chests, in proportions of three quarters Patna and one quarter Benares, and we hope that prices," &c. This letter, with the bills, was received by Oswald, Seal & Co. in December, 1847, and it appeared that at that time, or shortly afterwards, the appellant was made acquainted with its contents, and with the purpose for which the bills were transmitted. The bills were deposited in the hands of the appellant, whilst Oswald, Seal & Co. endeavoured to dispose of them, by advertising for a purchaser, in order to carry out the instructions of the respondents. The respondents had, on previous occasions, had various transactions with Oswald, Seal & Co., both in the purchase of opium, and in the purchase of cotton, and the accounts relating to the opium and those relating to the cotton were kept separately in the books of the firm, to which the appellant had access, and he was apprised of the remittances which from time to time were made. He had himself made the purchases of opium, which Oswald, Seal & Co. had bought for the respondents, and he was cognizant of the state of the accounts between the two houses at the period in question, those accounts being at that time balanced and even, with the exception of these bills. Oswald, Seal & Co. had no specific lien upon these bills, nor any authority to deal with them, otherwise than according to the directions *con-

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they at once advertised the bills in the *Calcutta Gazette*, but the time when such advertisements was made was not proved. Soon after they received them, namely, on the 11th of December, 1847, Fergusson, one of the partners of the firm, pledged them with the Agra Bank, as a security for a loan of Rs. 55,000, made by that Bank to the firm, and they were then endorsed to the Bank in the name of the firm. Whether this was done with the knowledge of any of the other partners did not appear; but one of the partners, Brown, was not privy to it. The bills were pledged to the Agra Bank as a collateral security only for the loan, the firm of Oswald, Seal & Co. having given, as the primary security, a promissory note of the firm, which became due on the 7th of January, 1848, and consequently, until default was made in the payment of this note, the Agra Bank was not entitled to negotiate the bills. At the time when the bills were thus pledged with the Agra Bank, or immediately afterwards, the appellant was made acquainted with the fact, and he was in daily communication with Oswald, Seal & Co. upon the subject of their engagements, and particularly of their debt to the Agra Bank, and the obtaining of funds to discharge it. The Bank pressed for payment, and, in order to meet the demand, the appellant agreed with the firm of Oswald, Seal & Co. to supply the money. He accordingly paid the Rs. 55,000 to the Agra Bank, on behalf of Oswald, Seal & Co., the Bank only dealing with the firm, and knowing nothing of the appellant in the whole transaction. The bills were accordingly given up to the appellant, as the agent of the firm, without any endorsement by *the Bank, and he retained them in his hands until the month of April following, when it was agreed between him and the firm that he should become the purchaser of them, at the price of Rs. 60,000, with interest, as upon a sale made upon the 7th of January preceding. This arrangement was afterwards communicated to the respondents by the firm of Oswald, Seal & Co., by a letter, dated the 26th of April, 1848; and of this letter the appellant was at the same time apprised by the firm. The bills were not endorsed to the appellant by the firm; nor did the appellant pay any money to the firm on account of the bills, but he was debited with the price of them in the books of the firm. At the time of, or immediately after, the sale of the bills to the appellant, he appeared to have agreed with the firm of Oswald, Seal & Co. to send on to the respondents a quantity of opium, equal in amount to the price at which he took the bills. This, however, he did not do, nor did he in any other

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way pay to the respondents the price or value of the bills. It further appeared, that the appellant subsequently sold the bills again to the firm of Oswald, Seal & Co., and received the amount of them in cash.

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The cause came for trial on the 21st of December, 1849, when the Supreme Court, without calling on the defendant, nonsuited the plaintiffs, reserving to them liberty to move. The plaintiffs applied under the leave reserved, and obtained a rule *nisi*, to set aside the judgment of nonsuit, and to enter a verdict for plaintiffs for the amount of the bills of exchange, with interest, on the common count for the bills sold, inasmuch as it appeared upon the evidence that the bills were sold to the defendant, by Oswald, Seal & Co., as agents for the plaintiffs, with notice to the defendant *that such agency existed, and that the sale was solely on the plaintiffs' account, and that there was sufficient privity between the plaintiffs and the defendant to entitle the former to sue the latter upon his non-payment of the bills; or, that a new trial should be had upon that ground, or upon the ground of improper rejection of evidence.

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The rule *nisi* came on to be argued on the 22nd of March, 1850, when the Supreme Court ordered that the judgment of nonsuit should be set aside, and that a new trial should be granted.

The cause was again tried by the Supreme Court, on the 17th of July, 1850, when the above facts appeared in evidence, and the Court gave a verdict for the plaintiffs, for Rs. 60,000, the value of the bills of exchange, on the common *indebitatus* count, for goods and securities sold and delivered, reserving liberty to the defendant to move to enter a verdict on a nonsuit, or to reduce the damages; with liberty for the plaintiffs to move on the common count for money had and received by the defendant to their use.

The appellant applied for and obtained a rule *nisi* to show cause why a verdict should not be entered for him, on the ground that the sale of the bills of exchange was from Oswald, Seal & Co., and not from the respondents; or why a new trial should not be had on the ground that the verdict was against evidence, or why the verdict should not be reduced to Rs. 5,000. The respondents also obtained a cross-rule, to show cause why they should not enter a verdict for the plaintiffs, on the common count for money had and received, in case the verdict for the plaintiffs should be set aside on the count for goods sold, on *the ground, that the proceeds of the bills were received by the defendant for the use of the plaintiffs, and that a verdict should be

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entered for the plaintiffs on the count upon an account stated ; and that the damages should be increased, by the amount of interest on the sum of Rs. 60,000, from the 7th of January, 1848, at the rate of 6 per cent.

These rules were argued before the Supreme Court, on the 5th of August, 1850, when the same were respectively discharged without costs, whereby the verdict, delivered in favour of the respondents, on the common *indebitatus* count for goods and securities sold and delivered by the respondents to the appellant, was maintained.

The judgment of the Supreme Court, delivered on discharging these rules, was pronounced by Sir LAWRENCE PEEL, Chief Justice.

[It is thought unnecessary to set out this judgment.]

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From this judgment the present appeal was brought.

The appellant submitted that the judgment, so far as regarded the rule obtained by him, ought to be reversed, for the following reasons :

First. Because the respondents, by indorsing and remitting the bills of exchange to Oswald, Seal & Co., transferred to them both the possession and property in the bills, and the latter indorsed and negotiated the same for value.

Second. Because the effect of the advertisement of Oswald, Seal & Co., the holders, was to induce the public to believe that they had power to sell, indorse and negotiate the bills ; which they accordingly did to third parties, and the appellant became afterwards the purchaser under the indorsement of Oswald, Seal & Co., *bonâ fide*, and for value.

Third. Because the respondents were not entitled to recover, and ought not to have recovered, anything under the count for goods sold and delivered.

On the other hand, the respondents submitted, that the judgment of the Supreme Court ought to be affirmed.

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First. Because the bills having been transmitted to the firm of Oswald, Seal & Co. by the respondents, and held by that firm as their agents, they were entitled *to adopt the sale made by the firm to the appellant as made by themselves, and on their account, and to recover the price from the appellant, as vendee, the firm of Oswald, Seal & Co. having no lien upon the bills, as against the respondents, and being bound to dispose of them on the respondents' account, and for their benefit.

Second. Because, as the appellant well knew all the circumstances under which the bills were transmitted to the firm of

Oswald, Seal & Co. by the respondents, and, under which they were held by that firm, he could not set up, as against the respondents, any right in the firm of Oswald, Seal & Co. to sell them on their own account, and in contravention of the right of the respondents, as he would thus become a party to a fraud upon the respondents, and be enabled to take advantage of his own wrong.

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Third. Because bills of exchange, and other securities for money, being the subjects of sale, the principles applicable to the sale of goods and chattels must be applicable to the sale of such instruments, and when sold by an agent must be deemed to be sold subject to the rights of the principal, so as to entitle him to the benefit of the contract.

Fourth. Because, the judgment having been entered generally upon the whole record, enough was shown upon the evidence to entitle the respondents to retain that judgment upon some one or more of the other counts of the plaint, even if the Appellate Court should be of opinion, that there is not sufficient to support the judgment upon the count for goods and bills of exchange sold and delivered to the appellant.

They also prayed, that the damages might be increased *by adding the amount of interest, at 6 per cent. upon the sum of Rs. 60,000, from the 7th of January, 1848.

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The *Attorney-General* (Sir A. Cockburn), and Mr. Leith, for the appellant :

It cannot be questioned, that the respondents, by remitting the bills in blank, authorised Oswald, Seal & Co. to dispose of them, in their discretion, as principals, and that power they exercised ; first, by depositing them with the Agra Bank for an advance of money, and afterwards by indorsing and selling them to the appellant for a *bonâ fide* consideration. Although it is perfectly true, that if bills are put into the hands of a party for a specific purpose, he is bound to deal with them in the manner directed, yet, in the present case, Oswald, Seal & Co. were not directed to deal with the bills in any particular way ; they were to put them in the market and apply the proceeds. The letter remitting the bills amounts to no more than a direction from one merchant to another to sell bills, indorsed by the sender on the sender's account, and to carry them to the sender's general account. It was a letter of advice and direction, and such notice in no wise bound the appellant to

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see that the directions with respect to the application of the proceeds was carried into effect. However reprehensible Oswald, Seal & Co.'s conduct may be in neglecting to apply the proceeds to the purchase of the opium, that cannot affect the appellant, a third party; he treated Oswald, Seal & Co. alone as principals; there was no privity of contract between the appellant and respondents, he did not buy the *bills from Oswald, Seal & Co. as the bills of the respondents. The bills were advertised for sale, and he became the purchaser. The action was wrong in form, it ought to have been upon a special contract, but in any circumstance the respondents were not entitled to recover under the count for goods sold and delivered.

They referred to *Bolton v. Puller* (1), *Wookey v. Pole* (2), *Collins v. Martin* (3), *May v. Chapman* (4), and *Buchanan v. Findlay* (5).

Sir Frederick Thesiger, Q.C., and *Mr. Badeley*, for the respondents, were not called upon to support the judgment.

They, however, submitted, that the respondents were entitled to have the damages increased, by allowing interest upon Rs. 60,000, from the 7th of January, 1848, as the contract was for sale of the bills, with interest from that date.

(SIR JOHN JERVIS : Have we any power to increase the verdict ? There are no facts to raise such a question. The contract you refer to is between Muttyloll Seal and Oswald, Seal & Co. The bills do not bear interest at the date, but at the maturity. When was that ?)

Six months after sight.

(SIR JOHN JERVIS : That depends upon the presentment, and you have no proof of its maturity (6).)

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SIR JOHN JERVIS :

We are of opinion in this case, that the judgment of the Court below should be affirmed. It is not necessary, in the view which we take of the case, to enter at any length into the circumstances

- (1) 4 R. R. 723 (1 Bos. & P. 539).
- (2) 22 R. R. 594 (4 B. & Ald. 1).
- (3) 4 R. R. 752 (1 Bos. & P. 648).
- (4) 73 R. R. 529 (16 M. & W. 355).
- (5) 9 B. & C. 738.
- (6) As to the power of the Judicial

Committee, under its common law jurisdiction, to give subsequent interest on a judgment debt, see *The Bank of Australasia v. Breillat*, 79 R. R. 24 (6 Moo. P. C. 152).

of it, in order to ascertain whether, if the count for goods sold and delivered could not have been supported, the verdict might have been retained on any other part of the record; nor to enter into an examination of the various cases which were collected or cited by the learned CHIEF JUSTICE in the Court below, because we think, upon a very short and clear ground, that the verdict was right, and that the judgment ought to stand on the count for goods sold and delivered.

The appellant's counsel have argued upon four grounds; first, that there was no privity of action in the contract between the parties; second, that the form of action upon the common count of *indebitatus assumpsit* is misconceived; third, that the house of Oswald, Seal & Co. were entitled to act as principals; and fourth, that the title which the Agra Bank had, was transferred to Muttyloll Seal; and that, therefore, he is not affected by anything that took place originally between the parties. The two last are merely illustrations of the first proposition, as they put them forward as points of pleading.

Now, we think we must assume, not only upon the evidence of Fergusson, but upon the probabilities of the case, that Muttyloll Seal knew of the transactions that had taken place between Oswald, Seal & Co., and Dent & Co., because Fergusson swears distinctly, that he communicated to Muttyloll Seal, who was the agent of that firm, at Calcutta, from time to time, what occurred; that he communicated the letter *sent by Dent & Co., dated the 29th of October, 1847, and that Muttyloll Seal knew that the opium account was squared, with the exception of this sum, amounting to 6,000*l*. And further, it is highly probable, that such should have been done, because Muttyloll Seal was under guarantee, that their business should be properly carried on. Therefore, we must assume that he knew of the letter, and the answer of the 27th, which was sent to him, and that satisfies us that the bills were sent, in the terms of the letter, to realise and the proceeds to be placed to the opium account, and was answered in these respects by the letter of the 28th of December; the bills, therefore, were sent to them with a specific appropriation, to be realised, either by discount or sale, and the proceeds were to be placed to the credit account. Muttyloll Seal, therefore, knowing that such was the case, and knowing that Oswald, Seal & Co. were the agents of Dent & Co., it becomes unimportant to consider, whether he purchased the bills on the 7th of January, as one party says, or on the 11th of April,

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with a fraudulent ante-dating of the contract, as the other party says; because it is quite plain that with a knowledge of the fact, and knowing that Oswald, Seal & Co. were the agents of Dent & Co., he did purchase the bills. It is quite plain, looking at the transaction, with the invoice and the debit note on the one side, that he takes credit for the amount of these bills sold, and debits them on the other side with the price paid for them; that it was a transaction for the sale of these identical bills, and that being so, it is plain, that the count for goods sold and delivered is supported, because there is a sale by the agents entitled to sell, and the

[*350] *simple question then would be, what has been the consequence? Although it is true that Oswald, Seal & Co. had authority to sell, yet, having sold, the person who is the purchaser must account to the principals for the proceeds. If he honestly paid over the proceeds to Oswald, Seal & Co., that would be a payment to Dent & Co. It should have been pleaded, if he had a set off, and for any other transaction that would have been a good set off. But there were no pleas on the record to meet such fact. That is sufficient to dispose of this case. It is useful, however, to observe, in order that it may not be supposed that we are proceeding on technical form or grounds, that the question raised on the pleadings in this case substantially affects the justice of the case; if there had been a plea of payment, which the facts of this case would not support, the effect of that plea nobody could doubt. These bills having been pledged with the Agra Bank, when the time for taking them up arrived, Muttyloll Seal did not become indorser for value of the bills, but in truth lent money to Oswald, Seal & Co., to whom he was under guarantee, for the mere purpose of redeeming the bills. As he knew they were remitted for the specific purpose of purchasing opium, he had no right, with the knowledge of that fact, to apply them for the purpose of paying the debt of Oswald, Seal & Co. Therefore, that would not have been sufficient evidence to support the plea of payment, and in no event would the judgment have been affirmed for the plaintiff in error. Looking to the judgment in the Court below, therefore, we are of opinion, that such judgment must be affirmed, but that there is no ground for giving

[*351] interest, *even if we were inclined to do so; there are no facts which could be the basis of any such judgment. The judgment of the Court below must, therefore, be simply affirmed, with costs.

ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

JENKINS AND OTHERS *v.* HEYCOCK.

(8 Moore, P. C. 351—362.)

1853.
June 14.

The warranty of seaworthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So held by the Judicial Committee, affirming the judgment of the Supreme Court at Calcutta, in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being, that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage.

Semble. There is no implied warranty of seaworthiness in a time policy.

[The law on the question of implied warranty of seaworthiness in a time policy is settled: see *Gibson v. Small* (1853) 94 R. R. 138 (4 H. L. C. 353); *Dudgeon v. Pembroke* (1877) 2 App. Cas. 284, 46 L. J. Q. B. 409, 36 L. T. 382; *Marine Insurance Act, 1906, s. 39 (5).*]

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

MAXWELL *v.* DEARE.

(8 Moore, P. C. 363—377.)

1853.
June 15.

D. & Co., merchants at the Cape of Good Hope, by a letter to M. & Co., merchants at Rio de Janeiro, ordered a quantity of coffee to be shipped and sent to them at the Cape of Good Hope, which D. & Co. proposed to pay for by a bill drawn by M. & Co. on Messrs. R., I. & Co., London, the general agents for both D. & Co. and M. & Co. The coffee was received by D. & Co. in due course, and a bill of exchange was drawn by M. & Co. R., I. & Co. received it, and credited the account of M. & Co. in their books with the amount of the bill, and debited the account of D. & Co. with a like sum. R., I. & Co. accepted the bill, but before it arrived at maturity, they stopped payment, and the bill was protested for non-payment. M. & Co. then brought an action in the Supreme Court of the Cape of Good Hope against D. & Co. for the price of the coffee shipped to their order. The Supreme Court were of opinion, that M. & Co., having agreed to execute the order in the terms proposed by D. & Co., and accepted in satisfaction of their demands the credit which was to be opened in their favour by D. & Co. with R., I. & Co., such credit was to be considered as money paid by D. & Co., and placed to the immediate disposal of M. & Co.

Upon appeal, held by the Judicial Committee (reversing such judgment):

First. That the effect of the arrangement between D. & Co. and M. & Co., to substitute a bill of exchange for cash payment was only to be considered as payment by the bill being honoured at maturity.

Second. That the entry of the amount of the bill of exchange in R., I. & Co.'s, the joint agents', books, to the credit of M. & Co., and the debiting of D. & Co. with a like amount, was not a payment for the coffee, and that M. & Co. did not by such entry accept in satisfaction of their demand the credit opened by the purchasers with R., I. & Co.

Cause remitted to the Court below to calculate interest upon the debt according to the Dutch Roman Law in force in the Colony.

ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.
**HENRY MCKELLAR v. JOHN WALLACE AND
 JOHN SPENCE.**

(8 Moore, P. C. 378—418.)

Principles which regulate a court of equity in opening stated and settled accounts.

[No judicial or other citation of this case has been found. Elementary law applied to rather complicated facts.]

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (1).

TRONSON v. DENT AND OTHERS (2).

(8 Moore, P. C. 419—459.)

A consignee of goods has such a right of property in the goods consigned to him as to maintain an action of assumpsit against the ship-owner for non-delivery of the goods.

A cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong to the respondents. The ship came in collision at sea, with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted *bond fide* and to the best of his judgment, selected the damaged chests of opium and sold them by auction, and forwarded the remainder to Hong Kong. It appeared that the master might have had the damaged opium re-dried and re-packed while the vessel was refitting, and have forwarded it, though deteriorated in value, with the other opium: Held, under such circumstances, in an action brought by the consignees against the ship-owner for the value of the opium damaged and sold, that it was the duty of the master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, although damaged, state.

By the ordinances constituting the Supreme Court at Hong Kong, it is enacted, that all matters relating to the practice and proceedings of that Court are to be the same as the Courts in England. The Supreme Court is composed of a single Judge, and there is no court of error or appeal in the colony. An appeal to England lies against any final decree, judgment, or sentence, or against any rule or order made in a civil suit or action, having the effect of a final and definitive sentence. In an action on promises, the jury found a verdict for the respondents. Before judgment was signed, the appellant applied to the Court for leave to appeal from such verdict to England, which the Judge, in the circumstances of the constitution of the Court, granted: Held, that as the English practice prevailed at Hong Kong, the allowance of such appeal was irregular, being

(1) Present: The Right Hon. Dr. LUSHINGTON, the Right Hon. T. PEMBERTON LEIGH, the Right Hon. Sir EDWARD RYAN, Knt., and the Right Hon. Sir JOHN PATTESON, Knt.

(2) Cited, *The Freedom* (1871) L. R. 3 P. C. 594, 602, 38 L. J. Ad. 25;

Notara v. Henderson (1872) L. R. 7 Q. B. 225, 230, 41 L. J. Q. B. 158; *Cargo ex Argus* (1873) L. R. 5 P. C. 134, 165, 42 L. J. Ad. 49; *Atlantic Mutual Ins. Co. v. Huith* (1880) 16 Ch. Div. 474, 481, 44 L. T. 67.

1853.
 June 17, 20.

1853.
 June 20, 22.

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in effect, an appeal against the verdict of a jury, and that the proper course would have been to have moved the Court below for a new trial, and to have appealed against the judgment refusing such motion.

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An appeal lies to this Court, as a court of error, if there be error on the face of the record such as might be moved in arrest of judgment in the Court below.

Where there is a fatal objection to the right of appeal, the respondent ought to apply to quash the appeal, and not to wait till the hearing to urge such objection to its competency.

THIS appeal was brought from a judgment of the Supreme Court of Hong Kong, upon the verdict of a jury in an action of assumpsit brought by the respondents *against the appellant to recover the value of twenty-two chests of Behar opium, shipped on board the steam vessel the *Erin*, of which the appellant was master, on a voyage from Calcutta to Hong Kong, and alleged to have been lost through the improper conduct of the appellant as such master.

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The declaration stated, that the appellant at the time of making his promises thereafter mentioned, was the master of the *Erin*, then in the river Hooghly, and bound from thence to Hong Kong, and thereupon Messrs. Gillanders, Arbuthnot & Co., merchants trading in Calcutta, on the 11th of July, 1851, shipped on board the *Erin* seventy chests of Behar opium in good order, of the value of \$42,000, to be taken care of and safely carried by the appellant on board such vessel from the Hooghly to Hong Kong, and there safely delivered in like good order to the respondents, the dangers of the seas only excepted; and further that, although a reasonable time elapsed, and the appellant had delivered a part of the said goods, to wit, forty-eight chests of Behar opium, parcel thereof, to the respondents, yet he did not safely carry the residue from Hooghly to Hong Kong, and there safely deliver the same to the respondents, although no danger of the seas prevented him; but, *that the appellant so carelessly and negligently behaved and conducted himself with respect to such residue, that by the carelessness, negligence, and improper conduct of the appellant and his mariners and servants, the residue, being of the value of \$12,100, was wholly lost to the respondents.

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The appellant filed a special plea to the declaration, whereby he alleged, that the goods, the value whereof was sought to be recovered by the respondents, were shipped in the river Hooghly, on board the *Erin*, of which the appellant was the master, on the terms of a certain bill of lading, wherein it was expressed, amongst other things, that the goods were to be delivered at the port of Hong Kong, unto the respondents, in good order and condition, subject

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to certain exceptions, and, amongst others, except accidents from seas, rivers, and steam navigation, of whatever nature or kind soever: and that, in the course of the navigation, a collision took place at sea between the *Erin* and a vessel called the *Pacha*, whereby the goods were completely saturated by sea water: that the *Erin*, shortly after such collision, arrived at Singapore: and that, on survey being had, parcel of the goods so shipped being opium, was found completely saturated with and very much injured by sea water: that, as master of the *Erin*, in discharge of his duty, and having only regard to the interest of the consignees, and being advised by numerous persons duly qualified, who had carefully surveyed the same, that the interest of the consignees and others interested in the said goods would be best protected by a sale thereof being made at Singapore, the appellant caused the same to be sold by public auction for the best price that could be got: and that *thereby, and without any carelessness, negligence, or improper conduct of the appellant, his mariners or servants, he had been hindered from making delivery to the respondents, except of the monies realised by such sale.

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To this plea the respondents replied that, although they admitted that the collision in the plea mentioned took place, and that, in consequence thereof, the contents of the twenty-two chests of opium were in some degree injured, yet that the opium, or no part thereof, was so injured or damaged as to authorise the sale, and negligent and unlawful default made by the appellant in the delivery thereof to the respondents, by which sale and default in delivery they had sustained a loss, as in the declaration mentioned.

The appellant filed a further plea, bringing into Court \$8,188. 95c., the net proceeds of the sale of the twenty-two chests of opium, and averring that the respondents had not sustained damages to a greater amount.

The respondents replied to the further plea, that they had sustained damages to a greater amount than the sum mentioned in the further plea, and issue was joined on the replication.

The action came on for trial on the 27th of March, 1852, before the Hon. Paul Ivy Sterling, the acting Chief Justice of the Court, and a special jury, when the counsel for the appellant objected to the trial proceeding, on the grounds: First, that the acting Chief Justice had been counsel in the case for the respondents, and had a bias. Second, that the special jury list was formed and nominated by the Legislative Council, whilst the acting Chief Justice

and Mr. Jardine were members of it, the former being at the *same time counsel for the respondents, and the latter deeply interested in the event of the action; and third, that the counsel for the appellant was too ill to conduct the appellant's defence.

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In support of the first objection, an affidavit of the appellant was read to the effect, that the acting Chief Justice had been retained by and acted as counsel for the respondents up to the 28th of February preceding the trial, when he was appointed to the office of acting Chief Justice, and that as such counsel he had advised the respondents in every step in the cause, and had the management of the case on their behalf.

The acting CHIEF JUSTICE overruled the objection, stating that his connection with the case did not extend beyond the settling of the pleadings then before him as Judge on the record; that he had no feeling of bias; and that, as sole Judge in the colony, he must try the case, or there would be a denial of justice to the respondents.

In support of the second objection, another affidavit of the appellant was read, to the effect that, by an Ordinance of the Legislative Council of Hong Kong passed on the 27th of August then last past, it was enacted that, as often as the list of jurors should be transmitted by the Registrar to the Government and Legislative Council, he and they should mark off and designate by the term "special juror," twenty-four of the names contained in the list, and that the persons whose names were so marked off or designated should be liable to serve both as special and common jurors, and the names of such special jurors should be formed into a separate list: that, at the period of passing and enacting that Ordinance, the Legislative Council was composed of the following persons: Sir George *Braham, Governor of the colony; the Hon. John Walter Hulme, the Chief Justice: the acting Chief Justice Sterling, then Attorney-General for the colony; the Hon. David Jardine; and the Hon. Joseph Frost Edger. That the special jury list then in force was formed and nominated by the above-named Legislative Council and Governor, the acting Chief Justice Sterling being at that time, and up to the 28th of February then last, the counsel of the respondents, and Mr. Jardine being a party interested as to the event of the action. This objection was also overruled by the acting CHIEF JUSTICE, on the ground that, although Mr. Jardine and himself were necessarily present as members of Council on the occasion of revising the jury lists for

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the year 1852, yet that Ordinance could have no possible connection with the trial of the present case.

In support of the third objection, an affidavit of the appellant's attorney was read, to the effect that, on the 19th of March, 1852, he had filed in Court a medical certificate of the inability of the appellant's counsel to conduct the trial. This objection was also overruled, in consequence of the appellant's counsel being in fact present, and on the ground of the delay on the part of the appellant.

The trial of the cause then proceeded.

It appeared from the evidence given on behalf of the appellant, that in July, 1850, when the *Erin* arrived at Singapore, after the collision with the *Pacha*, as mentioned in the appellant's plea, the forehold was full of water, covering the opium stowed in it, which was about six hundred chests, and that the sea water had penetrated the third compartment of the vessel, so that the lower tier

[*425] *or two of opium stowed in it were wetted. That the water gaining on the pumps, the vessel was run on shore, and as the tides each day increased in height, she was got further on the beach, and on the third day it was found that the vessel had two holes within two feet and a half of the keel; that the opium was during the same time removed as quickly as practicable, and deposited in the warehouse of the agent for the owners of the vessel; the marks and numbers of about two hundred and sixty-four chests were entirely defaced, and they were saturated with water, which was streaming from them when they were deposited in the warehouses; and as many more chests were wetted and damaged by the salt water. The appellant, after consulting with the agent of the owners, applied through him to the Chairman of the Chamber of Commerce at Singapore for advice as to the steps he should take, when the Chamber of Commerce advised that the opinion of the agents of the different Insurance Companies should be obtained. The agents accordingly met, and having examined the opium, advised the appellant that the damaged opium should be sold, as was usual in such cases, and that the sound should be re-packed and sent on to China. With regard to the usage, it appeared from the evidence, that the agents of Lloyd's had general instructions in case of damaged cargoes being brought to Singapore, to sell what might be found damaged, and to forward whatever was sound; and that on all former occasions when opium had been brought into Singapore under similar circumstances, it had been sold, excepting in one

instance, when the opium on board a vessel called the *Sylph*, in a damaged state, had been taken out and only *a small portion sold, and the rest dried, re-packed, and sent on to China; but, in that case the damaged opium was sold in Singapore for about \$500 a chest, whilst that which was forwarded to China did not realise there more than \$250 a chest. That the chests of opium were then surveyed by several of the principal merchants competent to form an opinion on the subject, who selected such of the chests, amounting to about five hundred chests, which were damaged, as they thought ought to be sold, and which were accordingly disposed of by public auction for the average sum of \$361. 23c. per chest. The price obtained was considered a very good price for the opium at the time it was sold; but the marks of many chests were effaced, and there was no evidence of the condition of the particular chests in question in the cause, or of the amount for which they were sold. Evidence was also given by the respondents to the effect, that there would not have been any difficulty in drying and re-packing the six hundred chests of opium in question, and sending them on to China within the month of August; that about nine hundred and twenty chests of damaged opium, saved from the wreck of a vessel called the *Sylph*, had been previously landed at Singapore, dried, re-packed, and re-shipped to China within a fortnight, and that the same operation might have been effected by the appellant with the opium in question. It also appeared, that it would have been more for the interests of the parties concerned, if the opium taken out of the *Erin* had been re-packed and sent on to its destined port, instead of selling it at Singapore, where the market for opium is very limited, not averaging more than three thousand or three thousand five hundred *chests during the whole year, including very little Patna, as the latter was seldom or ever taken when Benares opium was procurable; and it further appeared, that some of the opium shipped in the *Erin*, belonging to other parties, which had sustained similar damage, had been actually dried and re-packed at Singapore, and dispatched to China on board that vessel, when she continued her voyage, and had there been sold as opium, at prices little under those realised for the best sound opium.

The acting CHIEF JUSTICE charged the jury to the effect that, if the appellant could, with reasonable exertion, have brought on the respondents' damaged opium to China, in the marketable state of opium, either in the *Erin* or some other vessel from the frequented port of Singapore, he should have done so; that, from the evidence,

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it would appear that some of the damaged opium was brought in the *Erin* herself, and some in other vessels; that no local usage of the intervening port of Singapore would excuse the appellant from the legal obligation created by the bills of lading; that if, from the evidence, the jury were satisfied the appellant could have, with reasonable exertion, brought on the opium in its specific state, they would, according to the evidence adduced, assess the damage sustained by the respondents by the non-delivery of their consignment. On the other hand, if the appellant could not have so brought on the twenty-two chests of opium, they would find for him by naming the respondents' damage at the sum paid into Court.

[*428] The jury found a verdict for the respondents: *damages \$10,241; one month's interest \$72. 80c. and costs; and final judgment was entered up on the 24th of April, 1852.

Before final judgment was filed, and on the 5th of April, 1852, the appellant presented a petition to the Supreme Court, praying that he might be at liberty to appeal against the above judgment to her Majesty in Council. The acting CHIEF JUSTICE signed the following *fiat* at the foot of the petition: "Inasmuch as, in accordance with the constitution of the Supreme Court, there is but one Judge thereof, and no court of error or appeal in the colony; and it, therefore, appearing that the verdict in this case comes within the operation of her Majesty's instructions given on the 21st day of January, 1846, respecting appeals from the colony: Be it as above prayed." A summons was taken out by the respondents, calling upon the appellant to show cause why the *fiat* should not be rescinded or altered, and why the respondents should not have speedy execution. This summons came on for hearing on the 30th of April, in the same year, when the acting CHIEF JUSTICE refused the same, except as to that part of the application for granting speedy execution, for which an order was made.

The appellant appealed to her Majesty in Council, and submitted that the judgment of the Supreme Court of Hong Kong ought to be reversed, and judgment given for him, or a new trial had, for the following reasons:

First. Because the preliminary objections and points raised by the appellant's counsel, or some or one of them, ought to have been allowed.

[429] Second. Because the case was not rightly submitted to the jury by the acting CHIEF JUSTICE.

Third. Because the verdict was contrary to the evidence.

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Fourth. Because there was no evidence that any opium belonging to the respondents had been improperly sold.

Fifth. Because the facts proved in evidence did not establish that the appellant was liable to the respondents for any loss which they sustained by the sale of the opium in question.

The respondents, on the other hand, contended, that the judgment appealed from was correct, and ought to be affirmed, for these reasons :

First. Because there was no ground, either in law or fact, for setting aside the judgment of the Court below, or disturbing the verdict of the jury.

Second. Because the preliminary objections were, and each of them was, frivolous.

Third. Because it was the duty of the appellant, if he could, to carry, or cause to be carried, the opium to the port of delivery, according to the bill of lading.

Fourth. Because the first plea (if valid) set up a practical impossibility of carrying on and delivering the opium at Hong Kong according to the bill of lading, and the jury by their verdict, found that no such impossibility existed.

Fifth. Because the first plea (if capable of any other construction) was bad in substance, and, therefore, that it would be idle to grant a new trial.

Sixth. Because the second plea was contrary to the evidence, and had been disposed of by the verdict.

The case was argued by

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Sir Frederick Thesiger, Q.C., and *Mr. Bovill*, for the appellant ; and

Sir Fitz-Roy Kelly, Q.C., *Mr. Leith*, and *Mr. Willea*, for the respondents.

Before entering upon the questions raised by the appellant's reasons, a preliminary objection was taken by the respondents' counsel to the hearing of the appeal, upon the ground, that the appeal was irregular and incompetent, being in effect an application to the Court of last resort to set aside the verdict of a jury, which was contrary to the practice of the English Courts, by which the proceedings of the Supreme Court at Hong Kong were regulated according to the Ordinances, No. 6 of 1845, sec. 3, and No. 2 of 1846, sec. 3 ; and they insisted, that the proper course

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would have been to have applied to the Court below for a new trial, and to have appealed from the judgment of the Court if the application was refused. The appellant's counsel, in answer to this objection, contended that the respondents having appeared to the appeal and lodged their printed case, had submitted to the jurisdiction of the Court, and that it was too late to urge such objection to the hearing of the appeal; that the proper course would have been to have moved to quash the appeal, without putting the appellant to the expense of proceeding to a hearing, and then taking the objection *in limine* to the jurisdiction: *Shire v. Shire* (1), *D'Orliac v. D'Orliac* (2). They *also submitted that an appeal lay in this case, though it was from a verdict of a jury, *The Bank of Australasia v. Breillat* (3), and that the certificate of the acting Judge was evidence of the practice in Hong Kong, that parties should not be obliged to apply to the Court for a new trial; and that, even if such an appeal did not strictly lie, yet the Court, to prevent a failure of justice, could admit the appeal under the statute, 7 & 8 Vict. c. 69.

Their Lordships, without deciding upon this preliminary objection, permitted the hearing of the appeal upon the merits.

Upon the question whether there was such a right of property in the respondents, the consignees, by the bill of lading, at the time of the breach as to entitle them to sue the shipowner for the non-delivery of their consignment, *Coleman v. Lambert* (4), *Moore v. Wilson* (5), *Fragano v. Long* (6), *Erans v. Marlett* (7), *Thompson v. Dominy* (8), *Dutton v. Solomonson* (9), *Howard v. Shepperd* (10), *Abbott on Shipping*, p. 283 (7th edit.), were referred to.

As to the authority of the master of the ship, in the circumstances, to dispose of the cargo, *The Gratitude* (11), *Roux v. Salvador* (12), *Vlierboom v. Chapman* (13), *Read v. Bonham* (14), *Idle v. The Royal Exchange Assurance Co.* (15), *Hayman v. Molton* (16),

(1) 5 Moo. P. C. 81.

(2) 4 Moo. P. C. 374; and see *Rochford v. Battersby*, 81 R. R. 210 (2 H. L. C. 388).

(3) 79 R. R. 24 (6 Moo. P. C. 152).

(4) 52 R. R. 811 (5 M. & W. 502).

(5) 1 R. R. 347 (1 T. R. 659).

(6) 28 R. R. 226 (4 B. & C. 219).

(7) 1 Id. Ray. 271.

(8) 14 M. & W. 403.

(9) 7 R. R. 883 (3 Bos. & P. 582).

(10) 9 C. B. 297.

(11) 3 C. Rob. Adm. Rep. 240, 255—259.

(12) 43 R. R. 638 (3 Bing. N. C. 266).

(13) 67 R. R. 582 (13 M. & W. 230).

(14) 23 R. R. 587 (3 Brod. & B. 147).

(15) 21 R. R. 538 (8 Taunt. 755); and see note (d), 3 Brod. & B. 151 (23 R. R. 591, n.).

(16) 8 R. R. 837 (5 Esp. N. P. 65).

Knight v. Faith (1), Abbot on Shipping, pp. 6, 143 (7th edit.), Story "On Agency," Ch. VI., § 118.

Upon the objection to the pleadings, first, that the declaration was bad in substance, in not averring that the right of property was vested in the respondents, *Howard v. Shepperd* (2), *Galloway v. Jackson* (3), Stephen "On Pleading," pp. 354—359, were referred to; and secondly, that it could be moved in arrest of judgment after a plea of payment of money into Court, applying to different breaches in the declaration, *Wright v. Goddard* (4) was cited.

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The judgment of their Lordships was delivered by

SIR JOHN PATTESON :

In this case, the last point we have heard argued is one which would properly be made on a motion in arrest of judgment, treating it as a matter of error on the face of the record, namely, that the declaration is bad, and I am very glad that it has been fully discussed, because, although it is not mentioned in the appellant's reasons for the appeal, yet, as *Mr. Bovill* very truly says, there are objections taken on the other side which are not mentioned in the respondents' reasons: it is, therefore, very fair that it should be taken, and considered now. It is a point which steers clear of the objection taken on the other side, with respect to the nature of this appeal, whether the appeal could be made in point of form because, I take it, it is undoubted, that an appeal might be made here, treating this Court as a court of error, if there be error on the face of the record, such as *might have been moved in arrest of judgment in the Court below.

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The first question, therefore, to be considered is, whether this declaration be bad upon error after verdict and in arrest of judgment.

Upon this point we have been referred to the case of *Wright v. Goddard* (4), and the question is, whether that case goes the whole length of holding, that wherever there has been a plea of payment of money into Court, applying to different breaches in the declaration, there cannot be a motion in arrest of judgment.

The Court seems to have considered in that case, that there could not; but every case must be taken according to its particular circumstances, and, although that case is a very strong authority to show that you cannot move in arrest of judgment after a plea of

(1) 81 R. R. 725 (15 Q. B. 649).

(2) 9 C. B. 297.

(3) 3 Scott, N. R. 753.

(4) 8 Ad. & El. 144.

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payment of money into Court, perhaps we may say it is not quite conclusive of the position, that in no case whatever can such a motion be made after such a plea.

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We must then consider, whether this declaration be bad in arrest of judgment, assuming that the authority of *Wright v. Goddard* does not show that in such a case an arrest of judgment cannot be moved for. (His Lordship here read the declaration and proceeded :) Now, by this declaration, it is not pretended there was any negligence shown, which, indeed, is not at all material, because it would be sufficient to say, that the defendant did not deliver the residue, although no dangers of the sea prevented his doing so, inasmuch as he was bound to deliver unless he was prevented by dangers of the sea. The declaration states a promise ; of course all statements *of promises in a declaration are to be taken to be express promises, unless manifestly on the face of the statement they are implied promises in point of law ; and the pleas do not deny the existence of such a promise. There is no plea of *non assumpsit* ; but there is a special plea, setting out a great many facts and circumstances which are said to have occurred. Then there is another plea, which sets forth that “the defendant brings into Court a sum of money, being the net proceeds of the aforesaid sale of twenty-two chests of Behar opium, ready to be paid to the plaintiffs ; and the defendant further says, that the plaintiffs have not sustained damages to a greater amount than the said sum, in respect of the causes of action in the declaration mentioned ; and this he is ready to verify.” Certainly that plea, in terms, admits that the plaintiffs have sustained damages to the amount of the money paid into Court. The pleas do not deny the promise, or allege that, even if there were such a promise, the plaintiffs could have sustained no damage whatever by reason of any act of the defendant. Therefore, there is an admission, beyond all doubt, of the fact of the promise having been made.

We must go back then to the declaration to see whether or not, although there be an admission by the defendant in his plea of payment of money into Court, of a promise, in fact, whether the declaration states such a promise as would be binding in law, because it is contended that, although there may be in point of fact a promise, yet, if the declaration does not show such a promise as could be sued upon, it is bad in arrest of judgment, notwithstanding such an admission by the plea of payment of money into Court.

Certainly this declaration is not framed altogether in so technical a form as it seems to me it might have been ; but it does state that certain persons shipped opium to be delivered to the plaintiffs, the dangers of the seas only excepted, and that in consideration thereof, and of certain freight and reward to the defendant, "the defendant promised the plaintiffs to take due and proper care of, and safely and securely carry, and convey, and deliver." It is said, that it was not averred that the freight and reward were to be paid by the plaintiffs to the defendant ; it only says, "certain freight and reward to the defendant in that behalf ;" it does not say, "to be paid by the plaintiffs to the defendant in that behalf." I think that was matter of special demurrer, and that after verdict such an objection cannot be taken in arrest of judgment, because it being stated that the goods were shipped to be delivered to the plaintiffs—not, observe, to be delivered to the shippers, or by the shippers' order to be delivered to the plaintiffs, but it is that he "promised the plaintiffs to take due and proper care of, and safely and securely carry, convey, and deliver ;" the fair meaning of that is, although certainly not technically expressed, that the freight and reward to the defendant was to be paid by the plaintiffs ; and, after verdict, I think it is quite clear that it must be so read. Then, that being so, it is stated, that there is no request averred on the part of the plaintiffs. But I do not see where a request is necessary, unless it be meant that it was necessary to have averred that the shippers, at the request of the plaintiffs, shipped the goods ; but, I think, that cannot be at all necessary, because it is stated that the shippers delivered the goods to the defendant to be *carried by him, and to be delivered to the plaintiffs, and, therefore, that he made the contract with the plaintiffs.

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Now, can such a contract be made with the consignee of the goods ? It is not denied now, at least, that such a contract may be made with the consignee of the goods. At first, I thought it was intended to be argued that in no case whatever could the consignee of goods sue the shipowner for the non-delivery of those goods, but that the action must always be brought by the shipper ; but, I think, it is quite clear such a proposition cannot be maintained. It is true that in *Moore v. Wilson* (1), Mr. Justice BULLER nonsuited the plaintiff, who was the consignor, because it appeared by an arrangement between him and the carrier that the consignee was to pay the freight ; but on a rule for a new trial he held, that

(1) 1 R. R. 347 (1 T. R. 659).

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he was wrong in so doing, and the Court quite agreed with him, because, though the freight was to be paid by the consignee, the consignor of the goods was equally answerable for the freight, and might maintain the action. It was put in argument, that the consignor could maintain the action, as agent for the consignee, which may be correct if he does it as agent for the consignee, though it is not so put on the face of the declaration; but still the consignee, if he had thought fit, could have sued. However, that only goes the length of showing that the consignor may sue, not that the consignee may not.

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The case of *Fragano v. Long* (1) is a strong authority to show, that the person on whose account goods are shipped, may bring an action against the owner of the vessel. The argument there was, that he could not do so, because there was *no bill of lading making him consignee of the goods, so as to vest the property in him (it turned on the question of property very much), but the Court held, that the property vested in him as soon as the goods were sent from Birmingham to be shipped at Liverpool for Naples, and, although there was no bill of lading, yet that he was the owner of the goods, and, therefore, there was a contract between him and the shipowner, so that the action would lie. And that was an action of *assumpsit*.

In *Abbott on Shipping*, (7th edit.,) this point is a good deal discussed, and it is said (p. 283, [14th edit. 481]), "there is often some difficulty in deciding, to whom the master and owners are responsible on their contract evidenced by the bill of lading, and whether actions for loss or injury occasioned by their negligence or misconduct should be brought by the consignor or consignee. No rule of general application can be laid down for the solution of this difficulty, but it will always be important to consider, in whom the right of property, and sometimes in whom the right of possession, was vested, at the time of the breach of contract or neglect of duty which is complained of." Then he speaks of goods being "sent by a vendor to a vendee," in which case, he says, "the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for the loss of them." There are several cases referred to; amongst the rest, *Fragano v. Long*, to which I have just alluded; and at last it is summed up in these words (p. 292, [14th edit. 481]): "The result of these cases, which are not in all respects easily reconcileable, would appear to be, that actions against shipowners, as carriers, on their implied contract,

and actions for the loss or injury *of the goods entrusted to them, must be brought by a person who has some property in the goods. The consignee will be deemed to have such a property, unless the contrary appear." In support of which position is cited the case of *Coleman v. Lambert* (1).

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Now, I think it is quite clear, on the face of the declaration in this case, as we must read it, that the plaintiffs must be taken to have been the original consignees of these goods. The shippers were Gillanders, Arbuthnot & Co. The consignees must be taken *prima facie* to be the persons who have the property, if property is necessary in order to sustain this action, on a promise alleged as this promise is. Gillanders, Arbuthnot & Co., who were the shippers, might have been the shippers as agents merely for the plaintiffs; or they might have been themselves the owners (consistently I mean with anything that is stated on the face of this declaration), and the plaintiffs might have been merely their agents at Hong Kong to dispose of the goods. A great variety of circumstances are consistent with this declaration, and, if there be one state of things which is consistent with the declaration, and which may make the declaration good, before you come to enter into any evidence upon the subject (for I take it, you must see, that such a state of facts may apply to the declaration), the declaration on the face of it would be good. Now, it is quite consistent with this declaration, that the plaintiffs, who appear to be consignees on the face of it, may have been the very owners of the goods, and that Gillanders, Arbuthnot & Co. may have been merely their agents to ship the goods. It is said, that the contrary appears by the *special plea; but if we were to take the special plea into consideration, the contrary does not appear as regards the plaintiffs and Gillanders, Arbuthnot & Co., because, though the special plea states that they were to be shipped to the plaintiffs for trans-shipment to other persons, yet it does not show that Gillanders, Arbuthnot & Co., the shippers, had retained any interest or property in the goods whatever, and, therefore, some property would pass from them by the bill of lading, making the plaintiffs consignees, and by the shipment of the goods. The moment they had signed the bill of lading, some property would pass to the plaintiffs; whether a special property, in order that they might trans-ship the goods to other persons, or whether an absolute property, I do not think signifies, because it is laid down, as I

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have already read in Abbott, on Shipping, that there must be some property in the consignee. Now here, taking the statements in the plea to be correct, there is certainly some property in the consignees. Then, that being the case, the declaration, as it appears to us, after verdict, is a good declaration, because it is quite consistent with all that is stated there; that the goods had been originally shipped to be delivered to the plaintiffs; that they were the consignees, and, therefore, they were liable for the freight to the defendant; and that the defendant undertook and promised to convey and safely deliver to them at Hong Kong; and, therefore, after a plea of payment of money into Court, and the case I have already alluded to, we think the declaration is not bad in arrest of judgment, and, if it would not be bad in arrest of judgment, supposing such a motion could *be made, of course it is not bad on error; therefore, we must go into the other parts of the case.

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Now, the next question we come to is, whether or no an appeal will lie in such a case as this? The objection to the jurisdiction of this Court is raised on the part of the respondents, without any express notice in the reasons which are given in their printed case, and the point, as it seems to us, is one of very considerable importance, because, if appeals are to be brought here from the verdict of a jury, without any attempt having been made in the Court below to obtain a new trial, either upon the ground that such verdict was against evidence, or that it was grounded on the misdirection of the Judge, it is in truth and effect neither more nor less than moving in this, the appellate Court, for a new trial; which, if permitted, would be a most inconvenient practice, contrary as well to the usual course of this Court, as of the Courts in England, where, even after a motion for a new trial made and refused, or the rule discharged, if the objection does not appear on the face of the record, the Courts, being courts of error, will not entertain such an application. It was, however, conceded by the counsel for the respondents, that if a motion had been made in the Court at Hong Kong for a rule to show cause why there should not be a new trial on the ground of misdirection, or, on the ground of the verdict having been against the evidence, and the rule had been refused, or after a rule *nisi* had been granted it had been discharged, it would have been competent to the party whose rule had been so refused or discharged to have appealed to this Court, because it would have been an appeal against, in effect, a final *order of the Court below, which the language of the Ordinances

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appeared to authorise; but, certainly, it would be very inconvenient, to say the least of it, that such a course should be permitted without any motion having been made in the Court below. It appears, however, that in Hong Kong there is only one Judge, who at this time was the acting Chief Justice; such a motion, therefore, would have been made before him, the same person before whom the cause was tried; and, therefore, as regards any misdirection, the motion would be *ab idem ad eundem*; but, as regards the verdict being against the evidence, it would be far more convenient that the Judge who heard the evidence, and before whom the trial took place, should be the person to be applied to in the first instance, that he might determine whether it was a proper case or not to grant such rule. We feel, therefore, it would be very wrong to sanction any such omission in applying to the Court below for a new trial, and to hold, that a party might come at once to this Court by appeal and raise such a question.

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Now, let us examine the question that is thus raised, and see whether, according to the Ordinances, it is possible that it can be raised in this way. There are several Ordinances relating to the practice of the Court at Hong Kong and the mode of appealing; and it is argued that the practice of the Supreme Court may possibly be, that appeals, such as this, may lie without any such motion, and it is contended that the certificate of the acting Chief Justice allowing this appeal, shows that such is the practice. However, we think it is hardly fair to put that interpretation upon the certificate, for all the acting Chief Justice says is, that there is but one Judge of the *Supreme Court, and that there is no court of error or appeal in the colony; and it, “therefore, appearing that the verdict in this case comes within the operation of her Majesty’s instructions, given on the 21st day of January, 1846, respecting appeals from this colony: Be it as above prayed.” And, when he is asked to rescind the leave thus given, he dismisses the application, for reasons which, it is contended, are in the nature of a certificate by him, that the practice of the Court is, that the parties should not be obliged to apply to the Court for a rule *nisi* or a new trial. We think that is pushing the effect of the certificate rather too far, and beyond its legitimate import.

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Let us see, then, whether it be possible that there can be such an appeal consistently with the Ordinances. What is it that is appealed against? It is the judgment of the Court. Now, the judgment of the Court is manifestly a right judgment, so long as the verdict

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remains. If the verdict stands, no other judgment can be given, and, therefore, the judgment which is given by the Judge appears to be the only act of the Court, and it is only against an act of the Court that an appeal lies. There is no other act of the Court; the verdict is not the act of the Court; the verdict is the act of the jury, and I do not find anywhere in the Ordinances that anything is said about an appeal against the verdict of the jury. If that intervening step had taken place which I before alluded to, namely, that a motion had been made for setting aside the verdict and granting a new trial, then the refusal so to do on the part of the Court, would have been an act of the Court, and there would have been an appeal against that act; but I cannot see anywhere upon the face of these proceedings, or on *the facts which are brought before us, how there is any appeal against any act of the Court, otherwise than against a judgment of the Court; then, if that be so, what is this appeal? Why, it is nothing more nor less than an application for a new trial; not an appeal against an act of the Court, but an application to have the verdict of the jury set aside, and a new trial granted.

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Now, reference was made to some of these Ordinances, and with respect to the practice of the Court at Hong Kong. There is an Ordinance, No. 15, of 1844, which is one of the oldest, I think, we need trouble ourselves with, and it is said in section 3 of that Ordinance, that the law of England shall be in full force in the colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the colony, or its inhabitants; and then it enacts, "That in all matters relating to the practice and proceedings of the said Supreme Court, and not hereinafter provided for by this Ordinance, the practice of the English Courts shall be in force, until otherwise ordered by any rule of the said Court;" but there is nothing that I can find in this Ordinance which directs the proper practice with reference to setting aside a verdict at all. If, therefore, the practice rests on that Ordinance, it would certainly be necessary that there should be a motion to set aside the verdict in the Court of Hong Kong. There are, however, other Ordinances regarding this matter which it may be well to examine. The first, No. 6, of 1845, recites, that "It is expedient that the matters embraced in Ordinance, No. 15, of 1844 (the one I have just referred to), relating to the establishment of the Supreme Court of Hong Kong, trial by jury, criminal *proceedings, and the summary jurisdiction of the Court, should be provided for by separate and distinct Ordinances;" it then enacts that Ordinance, No. 15, be repealed,

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and the Court at Hong Kong, which had hitherto been holden by the Chief Superintendent, abolished; and it further enacts that there shall be a court of record to be called the Supreme Court of Hong Kong; and by section 4, it is enacted, that "the law of England shall be in full force in the said colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said colony, or of its inhabitants; and that in all matters relating to the practice and proceedings of the said Supreme Court, the practice of the English Courts shall be in force, unless and until otherwise ordered by rule of the said Court." Then it re-enacts, in effect, what it had just before repealed. There is another Ordinance, No. 2, of 1846, and which appears to have been made, after there was a Legislature established for the colony, because it recites, that it is expedient to amend the Ordinance, No. 6, of 1845, by making provisions for the saving of all proceedings, and all suits formerly depending in the Court of Hong Kong, the abolition of which Court is effected by the 2nd section of that Ordinance; as also with reference to the 4th section of the same Ordinance, limiting the operation in the colony of such of the laws of England, and the practice of the English Courts, to such laws and practice as existed when a local Legislature was first conferred on the colony. It then goes on to enact as follows: "And, whereas, also, it is deemed advisable to reserve to the Legislative Council of the said island the power of revising and approving of the Rules and *Orders to be made under the 2nd section of the said Ordinance, constituting a local court of error and appeal." It enacts, "That from and after the passing of this Ordinance, the said 29th section of the Ordinance, No. 6, of 1845, shall be and is hereby repealed."

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That was the section which constituted the Governor and Council a court of error and appeal; and by it the court of error was legally and properly put an end to.

Then the 2nd section enacts, "And be it further enacted and ordained that all proceedings formerly commenced in or adopted under the said former Court of Hong Kong, and that all suits and matters (if any) which may have been pending at the date of its abolition, may be continued or revived in the said Supreme Court." And section 3rd enacts, "That from henceforth such of the laws of England only, and such portion of the practice of the English Courts (subject to the exception of their applicability as contained in the 4th section of Ordinance, No. 6, of 1845) as existed when the

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said colony obtained a local Legislature, that is to say, on the 5th day of April, 1843, shall be of force." So that that continues the same practice, because the 4th section of Ordinance, No. 6, of 1845, which is alluded to there, does not touch that point; then, that being so, how can we possibly say, that in the Court of Hong Kong there is a practice that verdicts shall be set aside by a court of appeal in England? I do not see that there is the slightest ground for so saying. There are also the instructions of her Majesty of the 21st of January, 1846, which recite, that "it is necessary to make provision for permitting and *regulating appeals to us in our Privy Council from the Supreme Court of Justice of our colony of Hong Kong and its dependencies. Now, we do hereby direct and appoint that it shall be lawful for any person or persons being a party or parties to any civil suit or action depending in the Supreme Court of Justice of our colony of Hong Kong and its dependencies, to appeal to us, our heirs and successors, in our or their Privy Council, against any final decree, judgment or sentence, or against any rule or order, made in any such civil suit or action, and having the effect of a final or definitive sentence, which appeal shall be subject to the rules and limitations following:" It then sets out these rules and limitations, but they do not touch this matter, because the words of the instructions are clear, "any decree or sentence, or against any rule or order." Now, refusing a rule *nisi* for a new trial would be fairly considered as an order, and the discharge of that rule would be a rule or order. So that, if any application had been made to the Court at Hong Kong to set aside this verdict and grant a new trial, the decision of the Court upon that motion would have been properly the subject of an appeal under these words; but not a word is said about appealing against any verdict. The judgment, as I have already said, cannot be appealed against, while the verdict stands, and this is in effect and in truth neither more nor less than an appeal professing to be an appeal against a judgment, but, in truth, an appeal by way of motion to set aside the verdict, and to have a new trial. We think, therefore, that we cannot encourage such a proceeding, and that it would be very desirable to have it fully understood that no such application can be made *by way of appeal to her Majesty in Council, to set aside a verdict, and to have a new trial, unless there has been a previous application made to the Court in which the trial took place, to have the verdict set aside and a new trial granted, on whatever grounds that motion might proceed.

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Still, as this is a case probably of the first impression, and as it may not have been fully understood that this is or ought to be the rule on which appeals are to be allowed here; and we think the respondents ought to have applied to quash this appeal on that ground, and as they seem to have conceded the question from the course they have taken, that this Court had jurisdiction, we should have been very unwilling to have acted on what, we hope it will be understood, we mean to lay down as the rule on future occasions; for if we saw that the justice of the case was strongly in favour of the appellant, we should have been somewhat astute in endeavouring to find some mode by which we might recommend her Majesty that the case should be sent back to Hong Kong; or, that in some way or other, the appellant should have an opportunity of applying in the proper quarter to have the verdict set aside and a new trial granted.

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We have, therefore, thought it right to consider the question, whether or no the verdict was right or wrong; not at all meaning to say, that in any future case which may come here, we should think it right to enter into any such consideration at all, under circumstances similar to the present, namely, where a verdict had been given and judgment entered, and no application made to set aside that verdict in the Court below.

Let us then see what this verdict is. Here an action is brought against the master, and in substance the case is simply this: The ship *Erin* had sustained very considerable damage on her voyage towards Hong Kong. She was obliged to put into Singapore, and the cargo was instantly taken out, because the ship had sustained such damage that they were obliged to take the cargo out in order to repair the ship. A quantity of opium was found to be injured to a considerable extent by the salt water; and the master acting *bonâ fide*, as it is said, and there is no reason at all to suppose otherwise, taking the advice of a number of persons there, felt that his duty was not to carry on the opium in the state in which it was, without doing anything at all to it; for they all said that he should endeavour, whilst the repairs of the ship were going on, to dry the opium or to stop the damage that it was suffering from the sea water, and to carry it on in his own ship, and not to trans-ship it; but feeling he was justified, under the circumstances, in selling such damaged opium, he did sell it, acting for the best, as he says, for the consignees, and for all the parties interested. And no doubt it does appear that he did act according to the best

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of his judgment in that matter; that he took the advice of a number of persons on the spot, and that he is not to be accused of having committed any fraud, or having done anything which he did not believe to be right and proper on his part. It does appear, in the course of the evidence, that it had been rather too customary at Singapore, to sell the cargo whenever any accident happened to a vessel, or the cargo was at all damaged; but, however, that does

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*not impeach the conduct of the master on the present occasion; he appears to have acted as he thought was best for all the parties concerned.

Now, the first question is, was he justified in doing what he did? There is a very considerable difference between the sale of the ship and the sale of the cargo. The master is the agent of the ship-owners; he has the charge of the ship for them; he has, therefore, a much more powerful control over the ship in cases of injury, than he can have over the cargo, because he is altogether entrusted by the shipowners with the charge of the ship, but with regard to the goods which are shipped on board, it is not so; he is bound to convey them according to the tenor of his bill of lading, or whatever contract he has entered into, to their place of destination; and all the books of authority, English and foreign, say, it is only if an accident arises, if he is actually cast away, that he is to deal with the cargo, it being a necessity cast upon him, not by any act of others with whom he is connected, but by the events that have occurred, and because the cargo is not to be left to perish, or to be left unregarded and uncared for, and there is no one else on whom the duty of guarding the goods, or taking care, or doing the best with them, can be cast except upon the master; but we find in Abbott, on Shipping, it is laid down that the master is to be very careful in this matter, and that his duty is to carry the goods to their destination. "The disposal, however, of the cargo by the master, is a matter that requires the utmost caution on his part. He should always bear it in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has

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been entrusted with it, and this purpose *he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty, is an act for which both he and his owners may be made responsible; and the law of England does not recognise the authority of any tribunal, or officer acting upon his suggestion, or at his instance."

It has been held, that even a decree of a Court of Vice-Admiralty

will not protect him. Therefore, his duty is to carry the cargo, and convey it to the place of its destination, if the goods can be carried to the place of their destination in a merchantable state, although very much damaged; it is a grave question whether the master can, in any case, be justified in selling the cargo, because the goods would be more damaged in the course of conveying them from the place where he repairs his ship to the place of ultimate destination, than they have been already at the time he comes there. They may be damaged ten per cent. at the place where he is obliged to put in, in order to repair his vessel, and it may be that they will be damaged 20 per cent. by the time they arrive at the place of their destination; but it does not follow that he is at liberty to sell them on that account. If they are in such a state that he cannot convey them in the shape of merchantable goods to the place of their destination, and they would utterly perish when they arrived at their place of destination, that is quite another consideration.

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In the case of *Roux v. Salvador* (1), where a ship put into Rio de Janeiro with a cargo of hides, which were in such a state of fermentation that they were beginning to putrefy, and it was clear upon the evidence of all the persons *who had seen them, that it was impossible to take them across the Atlantic to Bordeaux, which was the place of their destination, because, long before they arrived at Bordeaux, they would have been a mass of putrefaction, and not hides at all, they were taken out of the vessel, and sold, and tanned and used at Rio de Janeiro, and it was said, and I recollect argued very strongly both in the Court below and in the court of error (I sat in the Exchequer Chamber on that occasion), that, because the hides were in the condition of merchantable goods at Rio de Janeiro, which was proved by their being tanned and used, the master was not at liberty to sell them, though he believed he could not carry them across the Atlantic if he had attempted to do so; inasmuch as they would perish altogether, although they might be in the state of hides at that time.

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Again, in the case of *Vlierboom v. Chapman* (2), a cargo of rice arrived in such a state that it would have perished altogether if it had been attempted to be carried on. There it was held to be quite clear that the master was at liberty to sell the rice.

Now, perhaps, it would be going too far to say, that it must be

(1) 43 R. B. 638 (4 Scott, 1; S. C. 3 (2) 67 R. B. 582 (13 M. & W. 230).
Bing. N. C. 266).

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perfectly clear, in all cases, that the cargo would have been destroyed altogether if it had been carried on, for every case must depend on its particular circumstances; but the fact that the witnesses here say that the opium would have suffered further damage from being carried on, falls very far short indeed of saying it could not have been carried on so as to be merchantable opium when it arrived at Hong Kong, though still more deteriorated.

[*452] The master acted *bonâ fide*; and something was said in the *course of the argument in this case upon that fact; but that has been put to rest altogether by the case of *Idle v. The Royal Exchange Assurance Company* (1). There the jury found that the master in selling the ship had acted fairly and *bonâ fide*, and for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted; but the Court of King's Bench on a writ of error (2) held that the necessity and legality of the sale was not to be inferred from the *bona fides* of the master. No doubt, if there was not *bona fides*, it would take another aspect; but the existence of *bona fides*, and the fact that the master acted to the best of his judgment, would not of itself be sufficient; it must be shown that there was an actual necessity.

That a sale of the cargo by the master is only justified by necessity was also held in the case of *Robertson v. Clarke* (3) in the Common Pleas. Lord GIFFORD, Ch. J., there said, "This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bonâ fide*, for the benefit of all concerned, and must be strictly watched. Nothing can now impeach the correctness of this principle, and the only question here is, did the evidence establish that urgent necessity? The jury have come to the conclusion that it did; and, after hearing the notes of the learned Judge who presided, I am of the same opinion. It is not disputed that the sale was *bonâ fide*; and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to show that the sale was *bonâ fide*, and for the benefit of all concerned, unless it be also shown that there was

[*453] urgent necessity for its being *resorted to; but that having been satisfactorily proved in the present case, the verdict cannot be disturbed on that ground."

Now these cases, and the case of *Read v. Bonham* (4), and a number of others that were referred to in the course of the

(1) 21 R. R. 538 (8 Taunt. 755).

(3) 25 R. R. 676 (1 Bing. 445).

(2) See note (d), 3 Brod. & B. 151

(4) 23 R. R. 587 (3 Brod. & B. 147).

(23 R. R. 591, n.).

argument, are cited and commented upon in the very elaborate judgment which was recently delivered in the Court of Queen's Bench by Lord CAMPBELL in the case of *Knight v. Faith* (1). I do not mean that that case turned upon the same question we have before us here, because it turned on a different and a very curious point, namely, whether upon a time policy a vessel which had received its death wound before the expiration of the time, but did not expire till afterwards, was to be considered as protected by the policy and other matters; but Lord CAMPBELL, in the course of that judgment, was obliged to go into the doctrine as to the master's power with respect to the ship, because he had sold the ship in that case, and he cites all those cases, and comments upon them very fully.

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What is the evidence, then, in the case before us? There is conflicting evidence. There is a great deal of evidence that it was the best thing that could be done for the consignees that the opium should be sold at Singapore; there is also evidence, on the other side, to show that it was not necessary to sell, and that the opium could have been dried; or, if that were doubtful, it might at all events have been dried partially during the twelve days that the ship was there repairing its damage. No doubt the evidence is conflicting; but taking the evidence on *the part of the appellant at the strongest, we have not been able to find that any witness says that the opium would have been destroyed if it had been carried on. The utmost the witnesses state, is, that it would have been much more deteriorated, and I can find no more than this—they all seem to admit that it might have been carried on in the same vessel after the vessel had been repaired, so as to be delivered at its port of destination, namely, Hong Kong, as opium—no doubt not worth so much as it was at Singapore; that might or might not be the case; but at all events it might have been delivered at its port of destination in its merchantable state, as opium. If so, none of the cases go the length of holding that the master under such circumstances was justified in selling. It is said, however, that the Judge who tried the cause, in his summing up, stated that other duties were supposed to be incumbent on the master, and that he stated what were not really duties incumbent on the master, and that, therefore, the jury may have been misled by him. If so, that is a ground of misdirection upon which a motion ought to have been made in the Court below for a new trial.

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The language of the Judge in his statement sent here of what

(1) 81 R. R. 725 (15 Q. B. 649).

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he told the jury is evidently only a summary. He says, "I charged the jury to the effect, that if the defendant could, with reasonable exertion, have brought on the plaintiffs' damaged opium to China, in the marketable state of opium, either in the *Erin* or in some other vessel from the frequented port of Singapore, he should have done so. That, from the evidence, it would appear that some of the damaged opium was brought on in the *Erin* *herself, and some in other vessels. That no local usage of the intervening port of Singapore would excuse him, the defendant, from the legal obligation created by the bills of lading."

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Now, an objection that is made to his summing up is, with respect to these words, "with reasonable exertion;" and it is assumed that by the words "reasonable exertion" he told the jury that it was the master's duty to have trans-shipped the goods, or, at least, that it was his duty to have dried the opium, and if it took two months to have dried the opium, it was his duty so to have done after he himself had left the place, because he clearly was not bound to keep the ship there for the purpose of doing so. If the ship could have been repaired in twelve days, of course he could have gone on at the end of those twelve days, but he was bound to get somebody to attend to the drying of the opium, and then to forward it to Hong Kong. I think it is a great stretch of ingenuity to say the words "reasonable exertion" mean all that. I do not know what the words "reasonable exertion" actually and necessarily import, but certainly there was some exertion which it was the master's duty to have made on that occasion. It is stated, I think by foreign authorities, that it is the Master's duty to trans-ship, but doubt is raised as to that; and in our Courts it should seem to be considered that he is quite at liberty to do so, and that if he does trans-ship, he would be protected in doing so, if it turns out in the opinion of the jury that it was the proper course of dealing with the goods, but that he is not positively bound to do so; if his own ship cannot carry them on at all, he may either leave *goods which are not perishable, or sell goods which are in their nature perishable, which cannot be carried on; which must, of course, be sold; but that is not the case here. But, although he may not be bound to trans-ship, he is at liberty so to do. In other cases it has been held that he ought to take all proper care of the cargo; but there is no authority that I know of which distinctly shows that he is bound to lay out a great deal of money in order to endeavour to repair the damage done to the

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cargo either by drying or in any other way. While the cargo is there, he may not have the means of doing so. He is bound to ventilate it, and so on; but that, I apprehend, is while it is on board the ship, and I think, if I am not mistaken, there is some case of a ship in Ireland where there was a cargo of corn, and the question was, whether it could be kiln-dried, and whether the master was bound to kiln-dry it there. The case did not turn on whether he was bound to do so; but, I remember the case, he had done it; and the question was, whether he was at liberty to do so? It is clear he was at liberty to do so, and here he would have been at liberty to have taken steps to dry this opium during the twelve days he was at Singapore. Whether he was bound to do it or not, need not be determined in this case: nor do I find that it was laid down by the Judge, at least I cannot collect from his language here that he laid down to the jury that the master was bound to do any such thing, but merely that he was bound to use "reasonable exertion" to have brought the opium on. It is, in order to be carried on, taken out of the vessel; therefore, if by reasonable exertion *he could have dried the outside of the chests, and put them back into the vessel, afterwards to be taken to Hong Kong, he was bound surely to use that "reasonable exertion" at all events.

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The Judge does not go on to state any other expressions he used from which we can tell what he really meant by "reasonable exertion."

On the whole question, I think we should be justified in saying, from what he has here stated, that he really did tell the jury that he was not bound to trans-ship, or to lay out a great deal of money in the drying of the opium, but that he was bound to carry it on, if it could be carried on in a merchantable state. Now, it could be carried on in a merchantable state as it appears to us, because, although the witnesses, more than seven in number, say, that it would have sustained greater damage, none of them say it would have been utterly destroyed. The learned Judge below goes on to say, "That if from the evidence the jury were satisfied Tronson could have, with reasonable exertion, brought on the opium in this specific state, they would, according to the evidence adduced for that purpose, assess the damage sustained by the plaintiffs by the non-delivery of their consignment. On the other hand, if the defendant could not have so brought on the twenty-two chests of opium, they would find for him, by naming the plaintiffs' damage of the sum paid into Court."

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Now that being the only statement we have of the mode in which the Judge charged the jury, we do not feel ourselves justified in saying, that there was any misdirection at all in the case, but that he must be taken to have told the jury, as we think the law is, namely, that if the opium could have been carried on *in the state of marketable opium to Hong Kong, although it might have sustained great damage in the course of its being carried on, the master was bound so to carry it on, unless there was somebody on the part of the consignees of the opium to give him different orders, and then it would have been matter of contract and arrangement with the consignees; but although there was a person at Singapore who usually acted for the plaintiffs, it does not appear that he took upon himself, or was authorised in any way, to deal with the opium on that occasion.

Therefore, that being the case, upon the evidence before us, we do not think that there was either any misdirection on the part of the Judge or that the verdict was contrary to the evidence in the case. Where there is conflicting testimony, we should not wish to deal with the case and send it back again, (supposing we had the power) unless we clearly saw that the verdict was contrary to the evidence; and this makes it more incumbent on the appellant, as it seems to us, to have applied to the Court below while the facts were recent and well known, and where he could have brought before the Court all the arguments that have been argued here, and where the Judge who would hear the motion had heard the evidence, and was so much better able than we are to form a judgment upon it.

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Upon the whole, therefore, as this is not a case in which we are of opinion that there has been any injustice done to the appellant, we probably should not have sent it back for a new trial, even supposing we had the authority to do so, much less can we feel ourselves justified in advising her Majesty to take such a step, as sending this case back again to Hong *Kong by reversing the judgment; we think, according to the true interpretation of the Ordinances, the practice in our Courts here is the practice which ought to prevail, and which, according to the Ordinances, does prevail in the Court of Hong Kong. We think the appeal does not lie under the circumstances; as it is, in effect, an appeal against the verdict, and not an appeal against any act of the Court. Under all the circumstances, we are of opinion, that the appeal must be dismissed, with costs.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.
**FEWSTER WILKINSON AND OTHERS v. THOMAS
 WILSON AND OTHERS (1).**

THE BONAPARTE.

(8 Moore, P. C. 459—483.)

Bottomry bond upon the ship, freight, and cargo; taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England: Held, that considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with the exigency of the circumstances of the case.

A Swedish vessel bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place on the 21st of November, 1848. Ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and the cargo re-loaded. The master at once communicated with the owners of the ship, resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, and the British consul at the port where the vessel lay, wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, and the master, in the month of March, 1849, hypothecated the ship, freight, and cargo for the money borrowed for the repairs: Held (affirming the judgment of the Admiralty Court), that the letter to the consignees was a sufficient notice to authorise the master raising money by bottomry on the cargo.

Where a party intends to rely upon a particular circumstance as a defence, that circumstance should be pleaded, and not raised at the hearing, *ore tenus*.

In a question of fact, the Judicial Committee not being satisfied with the sufficiency of the evidence, relaxed the inhibition, and remitted the cause to the Court below, to take proof by further affidavits upon that one point exclusively without requiring a fresh act on petition to be brought in.

THE question raised in this case was the validity of a bottomry bond, upon the ship, freight, and cargo, so far as part of the cargo was concerned. The bond was taken up by the master of the ship the *Bonaparte*, a Swedish vessel, at a port in Sweden, with the concurrence of the owners of the ship, who resided in Sweden. Its validity was opposed by the appellants, the owners of part of the cargo, who resided at Hull. The bond was not disputed by the other owners of the cargo, or by the owners of the vessel.

The circumstances of the case were as follows: The *Bonaparte*,

(1) Foll. *Australasian Steam Shipping Co. v. Morse* (1872) L. R. 4 P. C. 222, 27 L. T. 257; *Kleinwort v. Cassa Marittima of Genoa* (1877) 2 App. Cas.

156, 157, 36 L. T. 118; *Acatos v. Burns* (1878) 3 Ex. Div. 282, 291, 47 L. J. Ex. 566.

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belonging to the port of Uddevallah, in Sweden, being then on a voyage from Gottenburg to Hull, with a cargo of iron and deals, put into South Koster Bay, in Sweden, on the 22nd of November, 1848, in consequence of injuries sustained through bad weather. On the 25th of the same month the master communicated that fact to the owners of the *vessel, who resided at Berg, near Uddevallah, and requested them to supply him with the funds necessary for repairing the schooner. The owners, however, informed the master that they had no cash, and that he must get the repairs done at Stromstad, a port twelve miles distant, and there borrow money for the purpose. The master, upon that information, on the 3rd of December following, proceeded to Stromstad, and there applied to one Toren, a ship agent, and the British consul at that port, who advanced the sum of 392*l.* 15*s.* 11*d.* sterling, for the repairs of the schooner, on bottomry of the ship, cargo, and freight, at the maritime premium of 55*l.* 17*s.* 5*d.* sterling.

The bond thus given having been endorsed over by Toren to one Quensel, was by him endorsed over to the respondents, the legal holders of the bond.

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The act on petition of the respondents alleged, in substance, that the vessel, of the burthen of 52¹³/₁₀₀ tons, sailed from the port of Gottenburg on the 13th of November, then last past, laden with a cargo of iron and deals, and bound on a voyage to the port of Hull, and in the prosecution of such voyage encountered much bad weather and severe gales, whereby the cargo on board her was shifted, and the vessel became leaky. That with much difficulty she was got into Romsøe Bay in Sweden, and, on the 1st of December, she proceeded to Stromstad, when it was discovered that she had sustained so much damage in her hull and rigging, that it was necessary she should be repaired and refitted, in order to enable her to complete her voyage to England, and for this purpose the cargo was discharged, and the vessel was accordingly put into dock. That immediately upon the arrival of the schooner at Stromstad, the master went over to *Uddevallah, a distance of sixty miles, or thereabouts, where the owners of the schooner (chiefly farmers) resided, to inform them of the injuries the vessel had sustained at sea, and to obtain instructions from them for his guidance, and also the necessary funds to pay for the repairs indispensable to the schooner and the maintenance of the crew, but that the owners then informed him (the master)

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that they had no ready cash, and that they could not furnish him with the necessary funds, and that he must get the repairs effected at Stromstad, and there borrow the requisite sum on bottomry of the schooner, her cargo and freight. That the master being thus unable to obtain money from his owners, and being totally unprovided with the necessary funds for such repairs and refittings, and being unable to raise and supply the funds on his own personal credit, or that of the owners, applied to Mr. Toren, of Stromstad, to assist him in completing the repairs, and, amongst other things, to advance such sum as might be requisite for the payment of such repairs on bottomry, on the security, as well of the vessel, the tackle, &c., as of the cargo laden on board. That Toren agreed to lend and did lend to the master, on the aforesaid terms, the sum of 392*l.* 15*s.* 11*d.* sterling, for the use of the vessel as aforesaid, and that the master mortgaged and hypothecated to Toren the schooner, and also the cargo laden on board, and the freight to be thereafter earned for the transportation thereof, for the payment of the principal sum of 392*l.* 15*s.* 11*d.*, at the rate or premium of 15*l.* per cent., amounting in the aggregate to the sum of 451*l.* 13*s.* 4*d.* sterling. That the vessel was detained at Stromstad by reason of the severity of the weather, and as soon as the weather *permitted she proceeded on her voyage to England, and safely arrived at the port of Hull, on the 7th of April, 1849. That Gottenburg, and Uddevallah, and Stromstad, are all ports situated in the same province on the coast of Sweden, and that a bottomry bond, taken up in the same province of the same country as that in which the owners reside, with their consent and at their request, the master being unable or unwilling to advance the required funds, was valid and legal by the laws of Sweden.

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The answer on the part of appellants, the owners of the iron, part of the cargo, opposing the bond, denied that the bond was valid by the laws of Sweden, at least so far as respected the cargo on board the ship at the time the bond was executed, and insisted, that the bond was given in reality to secure a former debt of the owners of the vessel, and that the master, by whom the bond was given, had so admitted. That the whole of the cargo laden on board the vessel at the time the bond was executed, was the property of British subjects, and for these and other reasons could not be enforced by the Court of Admiralty.

The reply expressly denied that the bond was given to secure

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a former debt of the owners of the ship, or that the master had ever so admitted, and maintained that even if the whole cargo on board the ship had been the property of British subjects, as stated, that circumstance would not affect its validity, or the power of the Court of Admiralty to enforce the payment thereof.

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The proofs in support of the act on petition, consisted of affidavits made by the master and others, of the state of the vessel, and the application for money, together with a certified copy of declaration made *before the district Judge of Stromstad, and entered on the 10th of September, 1849, in the Register of Sentences of that Court, wherein it was stated, that the master, as well as the owners, declared in distinct terms before the consul there, that they each severally, as well as the other owners, were at that time unable to procure the necessary ready monies required to liquidate and defray the average expenses which the master had to pay for putting his vessel into a seaworthy condition again ; and, at the same time, they both declared that, under these circumstances, the average expenses should be paid without delay, so that the vessel might prosecute her voyage, and that there was no other means for them on that occasion to satisfy the advances of the funds for the average expenses, than to allow the master to sign a bottomry bond upon the schooner *Bonaparte*, the cargo she had on board, and her freight, and that in this extremity they empowered the master to get the advance of the funds for the average charges, and Toren, ship broker, to arrange and conclude the average and bottomry business.

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The affidavit of Anderssen, the master, after stating the circumstances respecting the vessel, her destination, voyage, and of her encountering bad weather, whereby her cargo was shifted, and she became leaky, proceeded thus: That by reason of the afore-said disasters, it became necessary that the schooner should bear away to a place of safety, and after much difficulty she was got into Romsö Bay, in Sweden, on the 21st of November last, and afterwards on the same day she came to anchor in South Koster Bay, in Sweden; that on the day after the arrival of the vessel in Koster Bay, the deponent proceeded from *Koster Bay to Johannes Jansson, who resides at Berg, which is near to Uddevallah, and sixty English miles distant from Stromstad, and which Jansson was the managing owner of the vessel, and the person from whom the deponent had previously been always accustomed to receive his orders respecting the vessel, and the deponent

arrived at Berg on the 25th of November last, and then and there related to Jansson the circumstances hereinbefore mentioned; and afterwards, on the same day, the deponent, accompanied by Jansson, went to Olaf Sundberg, another of the owners of the vessel, who resides at Raneberg, near to Uddevallah, and the deponent then and there informed them of the injuries the vessel had sustained at sea, with a view to obtain instructions from them, and also the necessary funds to pay for the repairs indispensable to the vessel; but they then informed him that they and the other owners of the vessel had no ready cash, and that they, therefore, could not furnish him with the necessary funds, and that he must get the repairs effected at Stromstad, a port in Sweden, and twelve English miles distant from Koster Bay, and there borrow the requisite sum of money to repair the ship, and do the best possible for the owners; that accordingly the deponent returned to the vessel in Koster Bay, where he arrived on the 30th of November last, and was detained by bad weather until the 3rd of December last, when he proceeded with the vessel from Koster Roads to Stromstad, where the vessel arrived in the evening of the same day, when it was discovered that she had sustained so much damage in her hull and rigging, that it was found and became necessary that she should be repaired and refitted, in order to enable her to complete her voyage, and that her cargo should be discharged, landed, and *taken care of. That the deponent being thus unable to obtain money from his owners, and being totally unprovided with the necessary funds for such repairs and refittings, and being unable to raise and supply the funds required on his own personal credit, or that of the owners of the vessel, or otherwise, applied to Toren to assist him in effecting and completing such repairs and refittings, and among other things to lend and advance such sum as might be requisite for the payment of the expenses of such repairs in the port of Stromstad. That the repairs and refitting, and discharging of the cargo, were subsequently proceeded with at Stromstad, and Toren advanced to him the necessary sums for that purpose, from time to time, on the express understanding that the same were to be so lent on bottomry of the ship, cargo, and freight; that accordingly Toren advanced 392*l.* 15*s.* 11*d.* sterling, which sum was necessary for the purposes aforesaid; and the deponent, for and in consideration of the same, did, by a bond of bottomry, bearing date the 26th of March, 1849, by him duly executed, with the full consent

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and authority of Jansson and Olaf Sundberg, acting for themselves, and as deponent was informed by them, and believes, for the other owners of the schooner, acknowledge that he had taken up and received of and from Toren, the full sum of 392*l.* 15*s.* 11*d.* sterling, for the use of the vessel as aforesaid, and, for the security of Toren, did bind himself, his goods, chattels, and effects, and more especially did mortgage, hypothecate, pledge, and assign over to him, Toren, his executors, administrators, and assigns, or to his order, the vessel, the *Bonaparte*, together with all her boats, tackle, apparel, and furniture, and all equipments and appurtenances, also the cargo laden on board the same, and the *freight to be thereafter earned for the transportation thereof in the aforesaid voyage, for the payment of the said principal sum and premium of 15*l.* per cent. thereon, amounting to the further sum of 55*l.* 17*s.* 5*d.* sterling, such aggregate sums of principal and stipulated interest amounting together to the sum of 451*l.* 13*s.* 4*d.* sterling, to Toren, or to his order, at or before the expiration of fourteen days next after the safe arrival of the vessel at the port of Hull aforesaid. And the deponent further said, that the schooner or vessel was, in consequence of the money so borrowed, repaired and refitted; and as soon as the weather permitted, to wit, on or about the 29th day of March last, he proceeded on his voyage to England, and safely arrived with the vessel at the port of Hull on the 7th of April last. And the deponent further said, that Gottenburg, Uddevallah, and Stromstad, were all ports situate in the same province, on the coast of Sweden, and that a bottomry bond on ship, cargo, and freight, taken up in the same province of the same country as that in which the owners of the vessel hypothecated reside, with their consent and at their request (themselves being unable or unwilling to advance the required funds), is, as the deponent had been informed, and believed, a legal bottomry bond, and valid by the laws of Sweden, and is recognised and allowed, and acted upon therein. And the deponent further said, that the bond was not, as alleged, given to secure a former debt of the owners of the vessel, but, on the contrary, the bond was in reality and *bonâ fide* given to secure the sum of 392*l.* 15*s.* 11*d.*, and for no other debt or sum of money whatever, and that such sum of 392*l.* 15*s.* 11*d.* was actually and *bonâ fide* and justly and truly expended *on such repairs and necessities as thereinbefore mentioned, and without such advance the vessel and her cargo must have

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remained at Stromstad, and could not further have prosecuted her voyage.

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The appellants brought in affidavits negating the fact of any repairs having been made at all, and alleging the value of the ship not to have exceeded 200*l*. No evidence was offered in support of the allegation in the appellants' answer that the bond was invalid by the law of Sweden, or that it was given for a former debt, and it appeared that both these objections were abandoned in the Court below.

The Judge of the Admiralty Court (The Right Hon. Dr. LUSHINGTON) by an interlocutory decree, dated the 23rd of May, 1849, pronounced for the force and validity of the bond, as applicable for the freight due for the transportation of the cargo lately laden on board the ship, and to that part of the cargo for which no appearance had been given; and further pronounced for the force and validity of the bond, as applicable to the iron, part of the cargo, for the owners of which an appearance has been given, and condemned the appellants to answer the action so far as regarded the iron in the proportion of the bond and interest rateably, with the value of such part of the cargo for which no appearance had been given, deducting therefrom the costs of suit, and after the application of the proceeds of the vessel and freight in part discharge of the bond and interest, and the costs of suit relative to the vessel and freight, and further condemned them in costs of opposition to the bond (1).

From this decree the present appeal was brought.

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The points raised on the appeal, and argued at the hearing, by the appellants, were :

First. That the bond was invalid, if not altogether, at all events as against the cargo, on the ground of its having been given in the country where the owners of the ship resided.

Second. That it was invalid as regarded the cargo, because no sufficient means were shown to have been used to obtain money on bottomry of the ship and freight alone; for until the inability to obtain advances upon the ship and freight had been satisfactorily proved, it was not competent to the master to pledge the cargo at all.

Third. That the advances alleged to have been made were not sufficiently proved to have been made, especially the party who was alleged to have made them, and who took the bond, being apparently

(1) See case reported, nom. *The Bonaparte*, 3 W. Rob. Adm. Rep. 298.

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the ship's agent, and having made no affidavit in support of the bond.

Fourth. That no repairs to the extent alleged were proved; on the contrary, that the surveys showed that no repairs were done to any such extent, and that the bond was, therefore, as well as for other reasons, a fraud, at least upon the owners of the cargo.

Fifth. That taking into account the value of the ship, as ascertained, if the repairs charged for were actually done, the cost thereof showed that she ought not to have been repaired at all under the circumstances, at least not at the expense of the owners of the cargo; and,

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Sixth. That the cargo ought (under the circumstances shown and contended for by the bondholders), instead of being bottomried, to have been trans-shipped *and sent to its port of destination in another vessel, or, if no such vessel could have been obtained, the cargo ought to have been landed, and that at any rate the owners of the cargo should have been (and which it was not pretended that they were) communicated with, in order that they might have sent out another vessel for, or have given such other directions as they might have thought fit in respect of, the cargo.

The authorities cited by the appellants were:

As to the duty of the master to communicate with the appellants, the consignees of part of the cargo, before resorting to a bottomry bond on the cargo, *Wallace v. Fielden* (1), *La Isabel* (2), *Jones v. Simons* (3), *Stonehouse v. Gent* (4), *Arthur v. Barton* (5), *Emerigon*, "Traité des Assurances," tom. ii. ch. iv. sec. 3 (edit. 1827).

That if any necessity existed sufficient to justify the master hypothecating the ship and freight, yet the bond was invalid, as he had no power to hypothecate the cargo, especially at a foreign port. *Wilson v. Millar* (6), *Duncan v. Benson* (7), *Benson v. Duncan* (8), *Duncan v. McCalmont* (9), *Emerigon*, "Traité des Assurances," tom. ii. ch. iv. sec. 12 (edit. 1827).

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The respondents objected to the question raised by the appeal, of the want of communication with the consignees of the cargo, being entertained, as that point was not alleged in the pleadings: *The Canadian* (10), *and, therefore, they had had no opportunity of meeting such objection.

(1) 83 R. R. 61 (7 Moo. P. C. 398).

(2) 1 Dodson, 273.

(3) 57 R. R. 714 (2 Q. B. 425).

(4) 57 R. R. 718, n. (2 Q. B. 431, n.).

(5) 55 R. R. 542 (6 M. & W. 138).

(6) 19 R. R. 670 (2 Stark. 1).

(7) 1 Ex. 537.

(8) 77 R. R. 776 (3 Ex. 644).

(9) 3 Beav. 416.

(10) 1 W. Rob. 343.

Upon the question of the validity of the bond, they submitted, upon the evidence, that the master was in such a case of unprovided necessity as justified him in resorting to bottomry and hypothecating the cargo. *The Gratitude* (1), *The Vibilia* (2), *The Lord Cochrane* (3), Story on Agency, ch. vi. sec. 118, Abbott on Shipping, pp. 143, 321 (7th edit.); and, that the Court favoured bottomry bonds, *The Kennersley Castle* (4), *The Reliance* (5), *The Calypso* (6), *The Cognac* (7), *The Vibilia* (8), were cited.

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Dr. Addams and *Mr. Willes*, for the appellants; and

Dr. Jenner and *Dr. Twiss*, for the respondents.

The judgment of their Lordships was delivered by

THE LORD JUSTICE KNIGHT BRUCE:

The question in this case is the validity of a bottomry bond purporting to affect the ship, freight, and cargo; but the case now before us, is only so far as the cargo is concerned: the appellants are the owners of the cargo, or of the most important and valuable part of it; the respondents are the persons to whom the bottomry bond has been transferred.

It is alleged by the appellants, that so far as the cargo is concerned, the bottomry bond was not warranted by maritime law, and is void; the contrary is asserted by the respondents, who claim the full benefit of the bond against the cargo, so far as it has not been satisfied by the ship and freight.

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The circumstances under which this bottomry bond was given, may be taken, for the present purpose, from the affidavit of the master. (His Lordship read the affidavit (9), and proceeded :) Now it appears that the master, with the aid of the consul at the port of Stromstad, proceeded to have the repairs done; but their Lordships collect from the materials before them that the repairs in effect were not commenced until the 17th of January. The time, therefore, during which the master might have communicated, or endeavoured to communicate, with the owners of the cargo, was the interval, in one mode of viewing the matter, between the 30th of November and the 17th of January; in another mode of viewing

(1) 3 C. Rob. 240.

(2) 1 W. Rob. 1.

(3) 1 W. Rob. 312.

(4) 3 Hagg. Adm. Rep. 7.

(5) 3 Hagg. Adm. Rep. 74.

(6) 3 Hagg. Adm. Rep. 165.

(7) 2 Hagg. Adm. Rep. 377.

(8) 1 W. Rob. 5.

(9) *Ante*, p. 92.

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the matter, between the 3rd of December and the 17th of January. He did communicate with the person who had shipped the cargo, or the greater and more valuable part of it, but that person declined to have anything to do with the repairs, alleging that what he had shipped had been shipped on the account and risk of all concerned. The whole, or by much the greater part of the cargo was addressed and consigned to the port of Hull, and that portion of it in question in this appeal, the more valuable portion of it, consisting of iron, was consigned to a house of trade there, who are the appellants.

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It does not appear that in these circumstances, during any part of the interval—a long interval when the subject-matter is considered, and when the distance and means of communication between the coast of Sweden and England are considered—that any communication took place from the master to Hull, or *that any attempt at communication was made; and one question for consideration is, whether, upon the materials which are before their Lordships, it was not the duty of the master, before hypothecating the cargo, to have had that communication, or at least to have attempted to have had that communication. That it is an universal rule, that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. [If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt (1).]

Now, in this case, considering the distance between Sweden and England, considering the length of time that elapsed before the repairs were done, their Lordships are of opinion that, supposing the point to be open on these papers, the materials before their Lordships show that the master did not do his duty to the owners of the cargo, and was not warranted, therefore, in hypothecating it.

(1) This sentence is erroneously given in the original report: see the correct reading, now substituted in the text, restored by the Judicial Com-

mittee itself in *The Hamburg*, Br. & Lush. 253, 273, 2 Moo. P. C. N. S. 289, 329.—F. P.

A question has been suggested whether the pleadings before the Court of Admiralty were so framed as to admit this point. Their Lordships are of opinion, that they were, and they are strengthened in that view by the manner in which the learned Judge of *that Court dealt with this particular part of the case. He says (1), "It has been contended, as a further objection in this case, on the part of the owners of the cargo, that the cargo ought to have been trans-shipped, or communication ought to have been made by the master to them, that is, the owners of the cargo, before the bond was given. With respect to the first point, I am not aware that there is any general obligation on the master of a vessel which is in need of repairs to trans-ship the cargo. In the present instance, the question appears to have been considered by the authorities at Stromstad; and I think it right to observe, that all the proceedings before them (and I have gone through the whole carefully) appear to me to have been conducted with the greatest possible care and attention, and I have no reason to doubt the fairness of all persons concerned. With respect to the second point, it appears, however, by the affidavit marked No. 3, that information of the necessities of the vessel was conveyed to the shipper of the cargo, and he refused to advance any money at all. Under this state of circumstances, does the law require that the master, as a matter of necessary obligation upon him, should have made a communication to the owner of the cargo in England, if indeed he knew who that owner was? As far as the evidence before me goes, there is nothing either in the bill of lading or in the other circumstances of the case which shows that the master knew in whom the property of the cargo was. I know of no authority which renders it imperatively necessary that such a communication should always be made, and I certainly do not perceive that the circumstances of this *case particularly required it. So far as the authorities go, in the case of *The Gratitude*, Lord STOWELL said, and said truly, it was exceedingly desirable that application should be made to the consignee of the cargo where practicable; but in no case whatever to my knowledge, and none has been cited, has it ever been laid down by this Court that there was an absolute necessity of making such communication. It may undoubtedly be expedient so to do for various reasons; amongst others, to take away all suspicion of fraudulent intention on the part of those concerned in the bottomry transaction."

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(1) 3 W. Rob. 308—309.

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Now, their Lordships, having considered the whole of the case, find no reason whatever to dissent from any part of the judgment of the learned Judge, except the single portion to which my observations have been directed. But their Lordships are of opinion, that upon the materials before the Court of Admiralty, there was a case in which it was the duty of the master to communicate, or endeavour to communicate, with the owners of the cargo, or at least with the appellants, and that there is no evidence that he did so, or attempted to do so. Assuming, therefore, that the entire case, capable of being adduced in point of evidence, was before the Court of Admiralty and is before their Lordships, their Lordships are prepared to say, that, as against the cargo, this bottomry bond cannot stand. But their Lordships are also of opinion, that the point upon the pleadings has not been so distinctly brought forward as to render it safe to justice to conclude the cause, as to this part of it, upon what was before the Court below. Their Lordships, therefore, are disposed, if the parties to this contest, or either of them, should desire the opportunity *of adducing further evidence before the Court of Admiralty, on the question of communication, or the absence of communication, the attempt at communication, or the absence of attempt at communication between the master and the owners of the cargo, and, if there was no communication, if there was no attempt at communication, then as to the existence or the absence of circumstances which might have justified the master in not making the communication, or in not making the attempt,—if the parties, or either of them, I repeat, are desirous to have that opportunity, their Lordships are determined to afford it.

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Are the learned counsel prepared now to say, whether they desire the opportunity?

Dr. Jenner :

On the part of the respondents, we do. Is it your Lordships' intention that the act should be written further to, or that there should be fresh affidavits?

LORD JUSTICE KNIGHT BRUCE :

Our opinion is, that without a fresh act, further affidavits should be brought in. If the respondents adduce fresh affidavits, the appellants will have the opportunity also, but the affidavits must be confined to the point which on behalf of their Lordships I have mentioned. We dissent from the judgment below on the single

ground mentioned. We remit the cause to the Court of Admiralty for the purpose of receiving further evidence as to that portion of the case. No costs to be given on either side.

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Their Lordships reported to her Majesty in favour of the appeal and complaint, that the inhibition served on the Court below ought to be relaxed, and the cause remitted to the Judge from whom the appeal was *brought, with intimation of the opinion of their Lordships that the force and validity of the bottomry bond proceeded on in the cause, as affecting the iron, part of the cargo, could only be impeached on the ground of no sufficient communication having been made, prior to the execution of the bond, to the owners or consignees thereof, and that the Judge ought to be at liberty further to proceed in the principal cause for the purpose only of receiving proof on both sides, in respect of such communication, and to make such final decree, and to make such order as to costs incurred in the Court below as to him might seem meet; and that the question of costs before the Committee ought to be reserved. This report was approved by her Majesty, and an Order in Council made in terms thereof.

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Upon this remit, evidence was gone into as to the point of communication. This evidence consisted of the affidavit of a merchant of Gottenburg, named Wesslan, the shipper of the wood laden on board the vessel, who deponed, that Toren applied to him, on behalf of the master, to advance money to repair the damage, which he refused to do, and immediately informed, or caused the consignees at Hull to be informed, of what had occurred, that they might protect their interest, and an affidavit of the master stating that he did by means of his agent, Toren, inform the consignees both of the wood and iron, which composed the cargo, of the disasters which had befallen the vessel, of his want of money, and that he asked the consignees to assist him by the advance of funds; that he saw the letters written, and had them before him at the time of dispatching them by the regular mail; and that *neither he nor his agent, Toren, ever received any answer to those letters; also an affidavit made by Kihlman, the agent of Good & Co., of Hull, the consignees of the wood, that he wrote to them that the master contemplated a bottomry bond on ship, freight, and cargo. An affidavit by Mr. Norberg, her Majesty's vice-consul, and agent for Lloyd's, at Stromstad, stating that he, by the desire of Toren, addressed the following letter, dated the 28rd of December, 1848, to

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Messrs. Wilkinson & Co., at Hull: "GENTLEMEN,—Although it is in a very disagreeable case I have to address you these lines, I find it necessary to advertise you about the adversity of Captain C. F. Anderssen of the schooner *Bonaparte*, who got into this port the latter part of November last in a distressed condition, arising from heavy gales at sea, having lost the greater part of his canvas, as well as booms, yards, &c., of the rigging, and about three feet of water in the vessel. The captain has employed Mr. W. M. Toren here, as his agent, and the protest is made at the Magistrate's Court here, in conformity to the log-book. I, being engaged here as British consul, and agent to Lloyd's Insurance Company in London, as also to part of British clubs, have been called upon by the captain's agent, Mr. Toren, to examine the log-book and to be present as surveyor, as well on the vessel as cargo. I have found the first-mentioned to be in a miserable state, and the iron is, to a great extent, very rusty, from the salt water having got to it; and as I observe you, gentlemen, to be the owners hereof, so I find it proper to communicate the case to you as it is. As for the rest of the cargo, consisting of wooden articles, the property of Messrs. Good, Flodman & Co., in Hull, I beg you will have *the goodness to communicate the case to them hereabout. The iron is in weight forty tons, and the wooden articles consist of (describing them). I beg you will have the goodness to address me or Mr. Toren what will be the best to undertake in this affair for the future." The respondents by their affidavit admitted having received this letter on the 16th of January following, and that they returned no answer. They stated that at no time in 1848 and 1849 did they receive any letter from Toren or any other person as agent of the master applying for assistance in effecting the repairs, and they denied that they had received any other letter intimating that the master could not obtain money from his owners, or that he was unprovided with funds for the repairs, or that the hypothecation of the iron was an event likely to occur.

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After considering this further evidence, the Judge of the Admiralty Court pronounced his decree on the 31st of December, 1852, sustaining the bond. The learned Judge was of opinion, that the evidence established that there had been sufficient communication to the respondents; that, according to his experience in the case of masters of small vessels, mostly people of inferior education and knowledge, the usual practice of the masters was, if the owner had no agent at the port which they happened to put

into in consequence of disasters, to choose some house of business to transact their affairs, and upon the agent so selected devolved such correspondence as he might think necessary with the owners. The learned Judge then proceeded to observe as follows: "The letter of the 23rd of December, 1848, was a very full and complete communication of all the facts in the case, and *I am a little surprised that this letter having been received by Wilkinson, Whitaker & Co. say on the 16th of January, 1849, they deemed it consistent with their interest to pass by the whole matter in silence, and to leave the vessel and the cargo to their fate without a single line of instructions to their own agent there, Wærn, or an answer to the British consul, who had addressed to them this letter, and who I must presume, from the offices he fills as British consul and agent to Lloyd's, is a person of respectability. They chose to entertain the notion, or idea, that the vessel would be repaired, no matter how. They were not aware of the absolute want of money, it has been said, but they expected the vessel to be repaired, and the cargo to be saved, but yet for any assistance they gave it might remain there for ever.

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"On the whole it is manifest to my mind that the consignees had ample information of the disasters which had befallen the vessel; that they were called upon in law to take measures for the protection of their property, and that they declined or neglected so to do, and I therefore think, that there was a sufficient communication within the meaning of the remission.

"But I cannot conclude this judgment without observing that this question, which was so much discussed in the Court above, and remitted for consideration here, was neither distinctly, nor at all, in my opinion, raised upon the pleadings in the Court below. It was merely an argument suggested in the course of the hearing of the cause, and perhaps I was to blame in not having noticed it at all in my original judgment.

"And, now I will see whether this opinion of mine *is or is not well founded upon the proceedings. The act on petition stated facts which I need not advert to, but now look at the answer—the defence. It denied that the bottomry bond, being made under the circumstances alleged by the bondholder, is valid by the laws of Sweden, at least so far as respects the cargo on board the ship, at the time when the said bond was executed. This puts into contest the law of Sweden. And it further alleged, that the bond was in reality given to secure a former debt of the owners of the ship, and

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that the master by whom the bond was given had so admitted that it related to the question of former debt. And it further alleged, that the whole of the cargo laden on board the ship at the time the bond was executed, and which purports to be included therein, was and is the property of British subjects. This is an allegation introduced, for what purpose I cannot say, and for these and other reasons they submitted, that the bond could not be enforced by this Court. Now, unless it is included under the words 'these and other reasons,' which I cannot suppose, because it would be contrary to the usual mode of pleading, the absence of communication was never hinted at in the slightest degree in the course of these pleadings.

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"Now, I must say, this in my judgment is greatly to be lamented, both on account of the great expense which has been occasioned to the parties in the cause, and the disgrace it reflects on the practice of the Court, that so very loose a mode of pleading should have been adopted, and which the Court, as it does not see the pleadings till the case comes on for hearing, has no means of correcting. If this had been the *defence intended to be relied upon, as a matter of common justice as well as correct pleading, it ought to have been stated with sufficient distinctness for the other parties to have taken issue thereon.

"I hope, if this case goes back again, that the Judicial Committee will be apprised, if they were not before, that this is not the ordinary mode of pleading adopted in this Court, nor sanctioned by it."

1853.
 —

Against this decree the appellants, the consignees of the cargo, again appealed, insisting, that the additional evidence did not establish that there had been such sufficient communication made to the owners of the cargo, prior to the execution of the bond, as the Court below had held.

The respondents, the bondholders, submitted that the further evidence taken in the Court below upon the remit, clearly proved, first, that on the 23rd of December, 1848, more than three months before the bond, a letter was addressed by the British consul at Stromstad to Messrs. Wilkinson & Co., the consignees of the iron, in which he acquainted them with the full particulars of the disaster which had happened to the *Bonaparte*, and of the damaged state of the iron on board, and requested that advice and directions relative thereto might be addressed to himself or Toren, the agent of the master; secondly, that this letter was received by Messrs.

Wilkinson & Co. on the 16th of January, 1849, and that no answer was ever returned thereto; and thirdly, that this letter was in the possession of Messrs. Wilkinson & Co. at the very time that the absence of any communication *with them was assigned in their former case as a reason for the decree of the Court below being reversed.

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Dr. Addams and *Mr. Willes* were heard for the appellants.

Dr. Jenner and *Dr. Twiss* appeared for the respondents, but were not called upon to address their Lordships.

LORD JUSTICE KNIGHT BRUCE :

Their Lordships were of opinion when this appeal was originally before them, that the case of the appellants failed, except upon one point, namely, upon the sufficiency of the evidence of the fact of any communication being made to the owners of the iron, part of the cargo, before the bottomry bond was given. The additional evidence now produced on that point has removed their Lordships' doubts, and they, therefore, must affirm the decree of the Court below, with costs.

ON APPEAL FROM PORT NATAL.
CLOETE v. THE QUEEN.

(8 Moore, P. C. 484—492.)

1854.
Feb. 20.

An order of suspension from the office of Recorder of the district of Natal, made by the Lieutenant-Governor and Executive Council of that district, under the powers of the Ordinance, No. 14, of 1845, for alleged misconduct as a Judge, founded upon charges of having permitted an affidavit reflecting upon the personal character of the Lieutenant-Governor of the colony to be reformed, instead of rejecting it altogether, or treating it as a contempt of Court, and for allowing private feelings to interfere with the administration of justice, held to be unfounded and frivolous, and ordered to be rescinded.

The Judicial Committee, in reversing the order, advised the Crown that the salary attached to the appellant's office of Recorder should be paid to him as if no order of suspension had been made.

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.
HENRY AUSTEN *v.* ROBERT HAY GRAHAM.

(8 Moore, P. C. 493—515.)

1854.
Feb. 21, 22.

An Englishman, who had resided for many years in India, and become imbued with Eastern notions, professing himself, at different times, a believer in the Hindoo and Mahomedan faiths, and to a great degree adopting the habits of life of the latter, by his will (which, with the exception of a small legacy, excluded his brother, his only next of kin, from any benefit), after bequeathing several legacies and specific bequests, gave the residue of his property to the Turkish Ambassador, or the person for the time being representing him, to be applied for the benefit of the poor of the city of Constantinople, and for the erection of a cenotaph at Constantinople, with a light burning, and a description of the testator engraved thereon. This will, which was in conformity with his written instructions, was duly executed during the last illness of the testator. The Prerogative Court by its sentence refused probate, upon the ground of the extraordinary nature of the bequest, coupled with the wild and extravagant conduct of the testator about the time of execution, which the COURT considered as amounting to insanity. That sentence was reversed upon appeal, and the will established; the Judicial Committee being of opinion, that as the will was in conformity with the written instructions of the deceased, the true test to ascertain its validity was to look into the previous habits and opinions of the testator to account for his extravagant behaviour and language, and that though the dispositions in the will might be absurd and irrational in a native of England and a Christian, according to English habits, they were accounted for in the case of the testator, who had in early life adopted the manners and mode of living of a Mahomedan.

[The only external evidence of insanity related to a date several days later than the will.]

CHANCERY.

CAREW'S CASE.

(2 Sm. & G. 1—18.)

[An order made in this case to stay proceedings under an order for winding up a provisionally registered Company was discharged on appeal as reported in 5 D. M. & G. 94.]

1853.
Nov. 25.
Dec. 1.
1854.
Jan. 17.

VOYLE *v.* HUGHES (1).

(2 Sm. & G. 18—30; S. C. 23 L. J. Ch. 238; 18 Jur. 341; 2 W. R. 143;
22 L. T. O. S. 269.)

1853.
Nov. 5.
1854.
Jan. 13.

STUART,
V.-C.
[18]

1. A voluntary assignment by deed of an equitable reversionary interest in personal property is valid.

2. The assignment by deed of an equitable reversionary interest in personal property, is not to be treated as a mere agreement; and, although it be voluntary, is not an incomplete gift, but is a transfer of the beneficial interest of the assignor.

By the settlement made on the marriage of the late Admiral and Mrs. Dorothy Noble, dated the 10th of November, 1820, 3,900*l.* 3*l.* per cent. Consolidated Bank Annuities were vested in trustees, of whom the defendants William Tooke and Claud George Thornton became the survivors, in trust, after the death of Admiral Noble, and in case Mrs. Dorothy Noble should die in his lifetime without leaving issue, and without appointing the fund, (all which events happened), for her next of kin according to the Statute of Distributions, as if she had died unmarried and intestate.

Mrs. Noble died in July, 1840; Admiral Noble died in October, 1851.

In the year 1840, after the death of Mrs. Noble, Mrs. Jane Kürner, of Stuttgart, in the kingdom of Wirtemberg, widow, a sister of Mrs. Noble, duly executed at Stuttgart a deed, dated the 8th of November, 1840, in the English form, and prepared in England, being between Mrs. Jane Kürner of the one part, and Miss Caroline Sarah Noble, since deceased, who was a daughter of the late Admiral Noble by a former marriage, and who was, at the date of the deed, a spinster and resident in Switzerland, of the other part, whereby, after reciting the marriage settlement above

(1) The point here decided had already been covered two years previously by the decision of the Court of Appeal in *Kekewich v. Manning*, 91 R. R. 53 (1 D. M. & G. 176); but the judgment of the VICE-CHANCELLOR in this case contains an interesting sur-

vey of the gradual development of the power of disposition conferred by the equitable ownership of a reversionary interest in personal property, which will explain the retention of the case here.—O. A. S.

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HUGHES.
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mentioned and the death of Mrs. Noble, and that Mrs. Kürner was entitled to one-fifth of the fund as *one of her next of kin, and had agreed to assign her share to Miss Noble for her own use and benefit, Mrs. Kürner, in consideration of natural love and affection, assigned the said share to Miss Noble in the usual manner, and gave her a power of attorney to demand and receive the same from the trustees. And Mrs. Kürner entered into the usual covenants for title, for quiet enjoyment, and for further assurance.

This assignment, when executed by Mrs. Kürner, was transmitted by her to Mr. William Tooke. Miss Caroline Sarah Noble was aware of its execution, and the provision made for her; and in February, 1842, having attained the age of twenty-one years, she wrote to Mr. William Tooke, requesting him to send her the deed. Mr. Tooke replied, that the deed, having been sent to him by Mrs. Kürner as her solicitor, and also as one of the trustees under the settlement, he did not feel justified in parting with it except by her express authority; but that Miss Noble might have a copy of it. A copy was accordingly furnished to her.

In March, 1842, Miss Caroline Sarah Noble forwarded to Mr. Tooke a written authority from Mrs. Kürner, dated the 22nd of February, 1842, to hand the deed to her the said Caroline Sarah Noble, and stating that she would have it when she came to London in the following month. Soon after he had received this, Mr. Tooke received from Mrs. Kürner a letter written by her, from Stuttgart, addressed to him, to the following purport:

"I have written to Miss Sarah Noble, insisting on her giving back into your honourable hands the free gift of mine in her favour, &c. &c., regarding my share of my late sister Dorothea Noble's fortune, of which her father has the usufruct during his lifetime, as the English laws allow him; but in the possible, though not probable, case that he survive his daughter, he has no right whatever to my share, which devolves to my natural heirs, or, if I be *yet alive, at my own further disposal again. Excuse, pray my dear Sir, my occasioning you so much perhaps undue trouble."

"In case that the said Miss Sarah Noble has not given back into your hands the above document, I herewith authorise you, Mr. Thomas Tooke, Esq., to redeem it of her."

Mrs. Kürner died in March, 1844. She made a will, dated the 9th of November, 1827; a codicil, dated July, 1838; and a second codicil, dated September, 1843; and administration with the will

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and codicils annexed was, on the 12th of August, 1852, granted by the Prerogative Court of Canterbury to Maria Henrietta Hughes, on the renunciation of the executors named in the will.

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Miss Caroline Sarah Noble and Mr. Francis Elliot Voyle, of Hazara, in the East Indies, intermarried in the month of April, 1844; and Mrs. Voyle died on the 14th day of October, 1852; and letters of administration to her estate were, by the Prerogative Court of Canterbury, granted to Mr. Patrick Alexander Reynolds, as the attorney and for the use of Mr. Voyle. No settlement or agreement for a settlement was made before or on the marriage of Mr. and Mrs. Voyle.

The trustees divided all the fund except a sum of 763*l.* 13*s.* 8*d.*, being the one-fifth share in question, which they re-invested in their names in the purchase of 781*l.* 5*s.* 3*d.* 9*l.* per cent. Consolidated Bank Annuities; and this share the trustees decline to pay to the plaintiff without the order of the Court, by reason of the letter of the 12th of February, 1842, and the claim made to the share by the administratrix of Mrs. Kürner

This was a suit by Mr. Voyle against Mr. Tooke and Mr. Thornton the trustees, the administrator of Mrs. Kürner, and the administrator of Mrs. Voyle.

The bill, after stating the above facts, prayed for a declaration by the Court, that, by virtue of the deed of the 8th of November, 1840, and the covenants therein, and the other matters in the bill stated, the plaintiff, either as against the estate of Mrs. Kürner or in the administration thereof, was entitled to the full amount of Mrs. Kürner's share, as one of the next of kin of Mrs. Noble, in the trust fund; and that the trustees might be ordered to transfer to the plaintiff the sum of 763*l.* 13*s.* 8*d.*, and the investments and dividends thereof.

[*21]

Mr. Glasse and *Mr. Cairns* for the plaintiff [relied on *Kekewich v. Manning* (1), and distinguished *Meek v. Kettlewell* (2)].

Mr. Russell and *Mr. G. S. Law* for the defendant, the administrator of Mrs. Kürner, [relied on *Meek v. Kettlewell*, *Edwards v. Jones* (3), *Holloway v. Headington* (4), and *Bentley v. Mackay* (5), and distinguished *Kekewich v. Manning*] :

[23]

The plaintiff is not entitled to recover the amount in this Court

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| (1) 91 R. R. 53 (1 D. M. & G. 176). | (3) 43 R. R. 178 (1 My. & Cr. 226). |
| (2) 58 R. R. 137 (1 Hare, 464; affirmed, 1 Ph. 342). | (4) 53 R. R. 75 (8 Sim. 324). |
| | (5) 92 R. R. 280 (15 Beav. 12). |

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against Mrs. Kürner's estate upon the covenants for title and further assurance, nor any sum by way of damages for breach of the covenant. All that the Court can do is to retain the plaintiff's bill for a year, with liberty to the plaintiff to sue at law upon the covenant in the deed: *Colman v. Sarrel* (1).

Mr. Dryden for the defendants Tooke and Thornton, the trustees.

Mr. Glasse replied.

His Honour, at the conclusion of the argument, said, the case was one of the greatest possible importance, and he should look into the authorities before he disposed of it.

1854.
Jan. 13.

THE VICE-CHANCELLOR NOW SAID:

The question in this case is as to the validity of a voluntary assignment by deed, duly executed, of a reversionary interest in a sum of money in the public funds, standing in the names of the trustees of the settlement under which the assignor was entitled. According to the decision in the case of *Meek v. Kettlewell* (2), as affirmed on appeal, this instrument is to be treated, not as an assignment, but as a mere agreement; and, being voluntary, and without any valuable consideration to support it, it confers no right on the seeming assignee to which this Court can give effect. The soundness of the doctrine which treats a deed of assignment, complete in form, as a mere agreement, although it in terms assigns and transfers an equitable reversionary interest in personal property, and which denies to it in this Court, if voluntary, any effect as a transfer of the right to property, has been much questioned. If that doctrine is to prevail, it deprives the owners of reversionary personal property of the right of alienation by one legitimate mode. As abridging the right of alienation, it materially *lessens the value to its owners of the enormous and increasing amount of reversionary personal property. Fortunately, in the recent case of *Kekewich v. Manning* (3), a more liberal and enlightened view of the law upon this subject was taken. In the present case, the question arises in a simple form. Under the trusts of the marriage settlement of 1820, the sum of 3,900*l.* 8 per cent. Consolidated Bank Annuities

(1) 1 B. R. 83 (1 Ves. Jr. 50).

(2) 58 B. R. 137 (1 Hare, 464; affirmed, 1 Ph. 342), where the subject-matter assigned was a mere *spes successionis* and not a reversionary interest,

as to which see *In re Ellenborough* [1903] 1 Ch. 697, 72 L. J. Ch. 218, 87 L. T. 714.—O. A. S.

(3) 91 B. R. 33 (1 D. M. & G. 176).

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was vested in the names of trustees (of whom the defendant Tooke is the survivor), upon trust, after the death of Admiral Noble, and in case his wife should die in his lifetime without issue, and without appointing the fund (all of which events happened) for her next of kin, according to the Statute of Distributions, and as if she had died unmarried and intestate. In 1840 Mrs. Noble died, so that upon her death her next of kin had a vested interest, subject only to the life estate of Admiral Noble, who died in 1851. After Mrs. Noble's death in 1840, Mrs. Kürner, one of her next of kin, having thus a vested interest in one-fifth of the fund, subject only to Admiral Noble's life estate, executed the deed of assignment under which the plaintiffs claim. The assignment is by deed dated the 8th of November, 1840. It recites the title of Mrs. Kürner under the settlement, and is in form an absolute assignment by Mrs. Kürner of her one-fifth of the trust fund to Caroline Sarah Noble, and gave her a power of attorney to receive it from the trustees. The deed contains a covenant for further assurance and quiet enjoyment. The consideration expressed in the deed is natural love and affection; but as Caroline Sarah Noble was a daughter of the admiral by a former marriage, there was no relationship in blood to Mrs. Kürner; the assignment, therefore, is purely voluntary. Mrs. Kürner, the assignor, herself transmitted the deed to Mr. Tooke, the trustee, who gave a copy of it to Miss Noble. It has been argued, that, as this assignment is purely *voluntary, it is a mere agreement, without any consideration to support it; that it is imperfect as a gift; imperfect, too, as a declaration of trust, and must wholly fail. Each of these three objections assumes an imperfection in the assignment, which is unfounded in fact; it is not an agreement, it is an absolute assignment by deed, purporting to transfer the estate or interest of the assignor to the assignee. As between them the transaction is complete; notice was given to the trustee, and that notice completed the transaction as to third parties; it established the right of the assignee on any question of priority, and protected her against any fraudulent receipt by the assignor. All this carries the transaction beyond mere agreement.

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Nevertheless, Lord HARDWICKE and other Judges have said that the assignment of reversionary personal property, for valuable consideration, "operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with the other to transfer and make good that right or interest." To treat

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an actual assignment by deed as a mere agreement, was a device resorted to in the earlier efforts to get rid of the legal doctrine, "that no possibility, right, title, nor thing in action shall be granted or assigned to strangers." The progress of law as a science, keeping pace, although not uniformly, with the advancement of civilization and wealth, has sanctioned modes of alienation and enjoyment of property, both real and personal, which were prohibited by the common law. During the successive steps of this progress, strange anomalies occasionally prevailed. Contingent and executory interests in chattels or personal estate were allowed to pass by testamentary disposition before contingent inheritable interests in land. It is only by modern decisions that the same power of testamentary disposition, before allowed to chattels personal, was extended to inheritable contingent interests and possibilities. That a valid voluntary disposition of contingent and executory or reversionary interests and possibilities might be made by will, but not by *deed, was an anomaly which could not long be tolerated. Even before assignments of reversionary interests, possibilities and expectancies of personal property were supported on the ground of agreements or by force only of a valuable consideration: more than one great Judge of this Court had endeavoured to get rid of the strict rule of law.

[*28]

Lord Chancellor COWPER, in the case of *Thomas v. Freeman* (1), says, "It is a notion that has obtained at law, that a possibility is not assignable, but no reason for it if *res integra*; but the law is not so unreasonable but to allow that it may be released." And that same Judge, soon after, in *Crouch v. Martin* (2), held, that a chose in action is assignable in equity upon a consideration paid. In the case of *Lord Carteret v. Paschal* (3), it was carried further, for it was said to be admitted on all sides that if a man in his own right be entitled to a bond or other chose in action, he may assign it without any consideration. But this view was not constantly adhered to; and there are several subsequent cases in which a valuable consideration was held necessary to support an assignment of mere personal property. Even after the decisions in *Sloane v. Cadogan* (4) by Sir W. GRANT, and *Fortescue v. Barnett* (5) by Sir JOHN LEACH, it was held by Sir JAMES WIGRAM and Lord LYNDEHURST, in the case of *Meek v. Kettlewell* (6), that the want of

(1) 2 Vern. 563.

(2) 2 Vern. 595.

(3) 3 P. Wms. 197.

(4) Sugd. Vend. & Pur., App. 24.

(5) 41 R. R. 5 (3 My. & K. 36).

(6) 58 R. R. 137 (1 Ph. 342).

valuable consideration to support the assignment made it ineffectual in equity. The more recent decision, in the case of *Kekewich v. Manning*, in which the authorities were reviewed, and in which the assignment was held to be valid, notwithstanding the want of valuable consideration, is sufficiently supported by authority, and rests on a sound and intelligible principle. The argument which treats the deed of assignment as a mere agreement or executory instrument, rests on this, that the *property is not transferable at law. But if that be a reason for treating the deed not as an actual conveyance, which it purports to be, why should it not as well apply to all conveyances of equitable interests in real or personal estate, which are not transferable or even conusable at law? (1).

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The deed of assignment being a perfect instrument, there is no room for the argument against its effectiveness founded on the doctrine that an incomplete gift is invalid in equity. In the cases of *Antrobus v. Smith* (2), and *Edwards v. Jones* (3), there was no deed of assignment, no completeness in the transaction. In *Antrobus v. Smith* the prayer of the bill was, that a proper deed of assignment might be executed.

As to treating an assignment by deed as a declaration of trust, or refusing to it any operation because it cannot be properly treated as a declaration of trust, there seems no legitimate ground for such an argument. If a deed of actual assignment of an equitable interest has any operation in equity as divesting the assignor of his equitable right, it is an operation no more in the nature of declaring a trust than any other actual conveyance of any equitable estate or interest in real or personal property. Therefore, there seems no other just view of this case than that which treats the instrument as an actual deed of assignment, and not as a mere agreement or executory instrument. And, if in the case of an assignment of an equitable reversionary interest in personalty for valuable consideration, the assignment, being by deed, transfers the property from the assignor to the assignee, and is not a mere agreement, the actual assignment by *deed of the same kind of property, without any valuable consideration, is not a mere agreement, and is not merely executory, but is an actual transfer of

[*30]

(1) In *Sir Moyl Finch's* case, 42 & 43 Eliz., as stated by Lord Coke, 4 Inst. 85 b, it was resolved by all the Judges that a trust in land could not be assigned over, "because it was a matter in privity between them, and

was in the nature of a chose in action, for he had no power of the land, but only to seek remedy by *subpœna* and not by the *cestui que use*."

(2) 8 R. R. 278 (12 Ves. 39).

(3) 43 R. R. 178 (1 My. & Cr. 226).

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an equitable right. This puts it beyond the infirmity of an incomplete gift, or the case of a right resting merely in contract, which requires a valuable consideration to induce a court of equity to interfere.

My decision proceeding on these views, it is scarcely necessary to advert to the argument on the effect of the covenant for further assurance, and on the case of *Cox v. Barnard* (1), where such a covenant was treated as creating a debt. No doubt, damages recovered for the breach of such a covenant would be a debt. But the covenant itself being *in fieri* and clearly executory, could hardly *per se* be a debt. Being voluntary and executory, it might be considered as within the doctrine of *Sutton v. Lord Chetwynd* (2), and the other cases in which the Court has refused to interfere on a voluntary covenant. Whether that doctrine is to be applied only to a claim for specific performance, or how the Court ought to deal with such a covenant in a case like the present, would require a very deep consideration of the principles of this Court as to covenants, into which, for the purpose of this case, it seems unnecessary to enter. Upon the whole, my opinion is, that, by force of the deed of assignment, the equitable right was transferred by Mrs. Kürner to Miss Noble; that the transaction was completed by Mrs. Kürner's execution of the deed, and that no valuable consideration was necessary to support the assignment. The plaintiffs, therefore, are entitled to a decree for the transfer of the fund.

By consent, the costs of all parties were ordered to be paid out of the fund.

1854.
Jan. 16.

STUART,
V.-C.
[31]

COLDWELL v. HOLME (3).

(2 Sm. & G. 31—35; S. C. 23 L. J. Ch. 594; 18 Jur. 396.)

A testatrix bequeathed 200*l.* to the Benevolent Institution, for delivering poor married women at their own habitations. Ten years previously to the date of the will a society bearing that title, of which she had been a member, had ceased to act; but at the date of the will there was, and had been long existing, a society, called "The Royal Maternity Society for delivering poor married women at their own habitations:" Held, that this society answered the description in the will, and was entitled to the legacy.

THIS was the petition of Sir John William Lubbock, the treasurer of the Royal Maternity or Lying-in Charity, for delivering poor

(1) 8 Hare, 310; and see at law *Ward v. Audland*, 73 R. R. 745 (16 M. & W. 862).—O. A. S.

(2) 3 Mer. 249, where articles for a settlement of real estate on marriage contained an ultimate voluntary limitation to a stranger: Held that the

stranger could not enforce specific performance of the articles upon failure of the limitations covered by the marriage consideration.—O. A. S.

(3) *In re Slevin* [1891] 2 Ch. 236, 60 L. J. Ch. 439, 64 L. T. 311.

married women at their own habitations; and it prayed the payment to him of a legacy of 200*l.*, with interest.

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*
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By her will, dated the 12th of March, 1846, Mary Satterthwaite, among other charitable legacies, bequeathed "the sum of 200*l.* to the treasurer of the Benevolent Institution for the delivery of poor married women at their own habitations;" and she directed that this legacy (*inter alia*) should be applied by the treasurers of the societies or institutions in her will mentioned, for the uses and purposes of the said societies or charitable institutions respectively, and should be paid free from legacy duty or other deductions, out of such part of her personal estate as might by law be applicable for that purpose.

The testatrix died shortly afterwards, and her will was duly proved by her executors. At the date of her death, the only society in existence for administering the species of charity contemplated by the testatrix, was a society founded in 1757, called the Royal Maternity Society for delivering poor married women at their own habitations, the transactions of which were conducted at 17, Little Knight Rider Street, Doctors Commons; prior to 1807, this society was called the Lying-in Charity for delivering poor married women at their own habitations; but, in 1824, it adopted its present name.

It appeared in evidence, that, from 1817 to 1836, when it ceased to act, there existed in London a society, called the Benevolent Institution, for the sole purpose of delivering poor married women at their own habitations, the business of which was carried on at Agar Street, of which, *for several years previously to its dissolution, the testatrix was a life member, having paid one subscription of 10*l.* 10*s.* In 1835, the funds having become insufficient, it was thought expedient that the society should cease to act, and the remaining capital was accordingly applied in payment of all charges due and owing; and the next year the society was discontinued, without, however, any formal proceeding to dissolve it. An affidavit was produced, of a maid-servant, named Ann Jones, to the effect that she had lived with the testatrix upwards of twenty years, and had frequently heard her mention having recommended poor women to a society of which she was a member, but without stating the name of the society.

[*32]

Mr. Malins for the petition :

At the date of the will, there was in being but one institution at all answering the description given by the testatrix. Then arose the

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question, was that description sufficient? The character of the society intended was precisely described, though there might be a misdescription as to the name. It was submitted, that where the intention was clear, an error in description would be relieved against in this Court. In *Horwood v. Griffiths* (1), there had been a misdescription of the species of stock intended; but, the intention being clear, his Honour had relieved against the error; and that decision had been affirmed by the LORDS JUSTICES on appeal. But, at all events, it was clear that the intention of the testatrix was, to dedicate this sum to this particular species of charity; and, therefore, even if the charitable object primarily intended must fail, the Court would still be at liberty to make a *cy près* application of the gift.

Mr. Rogers appeared for the executors of the testatrix, and took no part in the contest.

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Mr. Southgate appeared for the treasurer of the defunct society, and disclaimed any interest in the legacy.

Mr. Daniel and *Mr. Taylor* for the residuary legatees :

If the society, which had ceased to act in 1836, were now in existence, there could be no doubt it would be entitled to the legacy, because there would then be an object exactly answering the description given in the will. But if this proposition were established, and it could not be disputed, upon what ground could another society now claim to be entitled to the legacy. The Benevolent Institution was either clearly the object of the testatrix's bounty, or that object was doubtful : in the former alternative, the legacy failed by reason of the failure of the object intended : in the latter, the gift was void for uncertainty. But, then, it was contended, that there was here a clear gift for charitable purposes, and that, if the object primarily intended should fail, the Court would make a *cy près* application of the testatrix's bounty. But there was here no case for the application of the doctrine of *cy près*. Supposing, for argument sake, it might be in doubt for which of these two charities the gift was designed, it was, at all events, certain that it was bequeathed to one of them. There was, therefore, in this case, no intention to dedicate a fund to charitable purposes generally, but the gift was confined to one object, though what that object was might be more or less obscure. If that were

(1) Not reported.

a true view of the intention, it was clear, on the authorities, that the doctrine of *cy près* had no application. In *Clarke v. Taylor* (1) Vice-Chancellor KINDERSLEY points out the distinction between a gift to charity generally, indicative of a general charitable purpose, pointing out the mode of carrying it into effect, and an intention, not of general charity, but to give to some particular institution. In the former case, the doctrine of *cy près* is applicable; in the latter, as here, the gift fails, because there is no such institution.

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[*34]

THE VICE-CHANCELLOR:

The argument founded on the authority of *Clarke v. Taylor* appears to me to fail altogether. In that case, it was held that a gift to a charity by a very particular name and special description, was not a gift for charitable purposes generally. There was no object at all answering the description contained in the will; and the Court held it could not regard the legacy as dedicated to the purposes of general charity. The question to be decided here is wholly different. There is a clear gift for the benefit of a charitable institution, for delivering poor married women at their own habitations, and there is in existence such an institution. So far, the bequest is free from all ambiguity. But a doubt is created by the fact, that there was formerly, though it no longer exists, a similar institution for precisely the same charitable purpose, the name of which more exactly answers the description in the will than the present claimant, and of which the testatrix was herself a member. The doubt arises from the circumstance, that, if both societies were now in existence, and both claimants, the non-existent society, as more accurately described, would be entitled. The dissolution of that society being before the date of the will, leaves but one claimant.

It would be proceeding on a very unsound principle, in a case in which there is and was at the date of the will but one society at all answering the description, if, in the absence of any evidence to justify such a conclusion, I were to assume that the testatrix was ignorant that the society of which she had been a member had been dissolved, and ignorant also that there was a society in existence similar in name and identical in purpose. I do not think there is the least evidence to warrant such an assumption. I think, therefore, that the present claimants, being sufficiently *described, are

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COLDWELL
v.
HOLME.

entitled to the legacy, and that, were I to hold otherwise, I should be defeating the intentions of this benevolent lady. I shall, therefore, declare that the present petitioner is entitled to the legacy, and I must direct the costs to be paid out of the estate.

1854.
Jan. 16.

STUART,
V.-C.
[35]

WHITLOW v. DILWORTH.

(2 Sm. & G. 35—36.)

A husband and wife, in America, by a deed of separation, agreed to live apart, and that the wife should be at liberty to carry on business, &c., and to retain for her own use all her present and future property, in any way acquired. Subsequently a legacy, having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the COURT directed the stock to be sold, and the proceeds paid to her on her sole receipt.

THIS was the petition of Ann Owen, of Brooklyn, New York; and it prayed, that the sums of 365*l.* 16*s.* 11*d.* 3*l.* per cent. Consols, and 81*l.* 19*s.* 6*d.* cash, standing to the account of the share of Henry Owen and Ann his wife, might be transferred to the petitioner.

It appeared, that, in 1839, Ann Owen and her husband, being then domiciled in America, in consequence of family differences, agreed to separate; and a deed of separation was accordingly executed, by which it was agreed, that the wife should thenceforth live apart as a *feme sole*, and be at liberty to carry on business, &c., and hold all the property to which she was then entitled, or to which she should become entitled by purchase, devise, or otherwise, for her sole use. Immediately after the execution of the deed, the husband left his wife permanently. In 1849, Ann Owen became entitled to the fund in question, under the will of Robert Whitlow, which, by an order on further directions, dated 17th of November, 1849, was carried to "The account of the share of Henry Owen and Ann his wife."

An affidavit had been made by the wife in support of the petition, that she had never had more than two children, who were both deceased; that, from the time her husband had left her, in 1839, she had never heard from or of him; and that there never had been any settlement made or agreed to be made on her marriage.

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Affidavits were also produced, made by Mr. Charles Edwards, described as counsellor, notary, and attorney, and standing counsel to the British Consulate at New York, and by his clerk, to the

effect, that inquiries had been made at Sackett's Harbour, Jefferson's county, State of New York, where some connexions of the husband had resided, and where it was supposed he might be heard of; but that it had been ascertained they had removed to Rome, Oneida county, whither they had been followed, but that no trace of them or of the husband could be found. As a last resource, the copy of the petition had been inclosed in a letter, and "mailed," addressed to Henry Owen, Rome, Oneida county, State of New York; but no reply had been returned.

WHITLOW
v.
DILWORTH.

Mr. Roxburgh, for the petition, urged, that, after a great lapse of time without news from or of him, the Court would presume the death of the husband. But, even if the husband were not dead, under the deed of separation the wife was entitled to the fund.

The VICE-CHANCELLOR said, the difficulty he felt was, that the order made on further directions recognised the husband's interest in the fund. But, as it seemed to have been made in ignorance of the deed of separation, and as it was clear that the stock was property accruing in right of the wife, and that the husband was no longer providing for her maintenance, and had separated himself from her for so many years, and could not be found, he thought the order might be made.

An order was then made, directing the stock to be sold, and paid to Ann Owen on her sole receipt; the costs to be paid out of the cash.

M'CORMICK v. GARNETT.

(2 Sm. & G. 37—39.)

1854.
Jan. 18.

[Reversed on appeal, as reported in 5 D. M. & G. 278.]

GRISSELL v. PETO.

(2 Sm. & G. 39—43; S. C. 18 Jur. 591; 2 W. R. 178.)

1854.
Jan. 19.

A lessor, being in possession of a lease of certain messuages, granted an underlease of one (No. 7) to A., who subsequently assigned it to B. The lessor by his will demised the leaseholds to trustees, who, under an order of the Court, sold *inter alia* No. 7 to a purchaser, in the particulars of sale No. 7 being described as leased to A. On investigating the title, it appeared that the parcels set out in the underlease to A. were, by a clerical mistake, the parcels of No. 6. The trustees, after the sale, obtained an order of the

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V.-C.
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Court to correct this mistake, by authorising an assignment to the tenant of No. 6, and a new underlease, with proper parcels, to the tenant of No. 7; and the COURT overruled an objection to the title by the purchaser of No. 7, and compelled him to complete his purchase.

By an order, dated 9th of December, 1852, made in these causes, certain leasehold houses, vested in trustees, were directed by the Court to be sold. The houses had been built by Mr. Henry Peto, the testator in the cause, upon plots of land granted to him in 1823 by the Commissioners of Woods and Forests for a term of eighty-eight years, at a ground rent of 5*l.* per annum for each plot. Upon the 1st of December, 1823, Mr. Peto granted to a Mr. Lewis Mackenzie a lease of that date of the house No. 7, for a term of eighty-seven years and a half, from the 29th of September, 1853, at a yearly rental of 50*l.*, which lease had been subsequently assigned by Mr. Mackenzie to Lord Walsingham, in whom it was now vested. Mr. Peto subsequently devised the original lease to his trustees upon certain trusts, of which the performance was decreed in this suit. The property was sold under the decree of the Court on the 20th of April, 1853, by public auction, when Lot 3, being No. 7, Upper Portland Place, was knocked down to Mr. Charles Goding at the sum of 1,080*l.*

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It was described in the particulars of sale as follows: "Lot 3. An improved rent of 45*l.* per annum, arising out of a leasehold residence and stabling, being No. 7, *Upper Portland Place, Regent's Park, nearly of a similar description as Lot 2, to which it adjoins. The property is held under a lease, of which fifty-eight years are unexpired on the 5th of July, 1853, at a small ground rent of 5*l.* per annum, underleased to Lewis Mackenzie, Esq., whose term expires at Lady Day, 1911, at 50*l.* per annum. The estimated annual value is 250*l.*"

Upon the delivery of the abstract, it was ascertained that, in the lease granted of No. 7, in 1823, by the testator to Mr. Mackenzie, the parcels set out were, by some inadvertence, not the description of No. 7, but of No. 6. Immediately upon the mistake being discovered, the purchaser refused to complete the contract. The plaintiff thereupon, acting under the advice of Mr. Lewin, the conveyancing counsel, proposed to cure the defect by granting to Lord Walsingham, the assignee of Mr. Mackenzie's term, a lease commensurate with the residue of the lease granted by the testator to Mr. Mackenzie; and a petition was presented by the trustees to the Court for liberty to proceed against the purchaser; upon which, on the 21st of June, 1853, the Court made the following order:

Upon reading the petition, and upon the Right Honourable Lord Walsingham joining in the assignment to be made by the petitioners to Francis Richardson (the lessee of No. 6) of the house No. 6, Upper Portland Place, in the parish of St. Marylebone, in the county of Middlesex, this Court doth order, That an underlease be granted by the petitioners to Lord Walsingham, of the house and premises No. 7, Portland Place, for a term which will expire at the like period as the underlease, dated the 1st of December, 1823, would have determined by effluxion of time, at the like rents, and subject to the like covenants, conditions, provisoes, and agreements as are reserved, expressed, and contained in and by the said underlease; and in case Charles Goding, in the petition mentioned, shall refuse to complete and perform his contract made for the purchase *of the said house and premises, No. 7, Upper Portland Place, it is ordered, that the petitioner be at liberty to apply by summons, at chambers, to enforce the performance of the said contract.

GRISSWELL
PETO.

[*41]

The purchaser declining to complete the contract a summons was taken out before the Judge, at chambers, but was subsequently adjourned to Court.

Mr. Campbell and Mr. Karlake for the purchaser :

No rule of this Court was better settled, than that a purchaser was entitled to have the identical thing for which he contracted or he could not be compelled specifically to perform the agreement. In this case the purchaser was entitled to have a simple title to the house No. 7, in lieu of which it was proposed to give him a title involved in the title to No. 6. The purchaser had contracted to accept no such title.

Again, the purchaser contracted to purchase the residue of the lease granted to Mr. Mackenzie; in lieu of which it was proposed to concede to him the security of a lease to be granted by the petitioners to Lord Walsingham. It was idle to contend that Lord Walsingham was as good a tenant as Mr. Mackenzie, because that was not the question before the Court. If Lord Walsingham were a thousand times a more advantageous underlessee, that circumstance would not detract from the purchaser's right to have the thing for which he contracted. He was not bound to accept whatever the vendors chose to offer him, merely because it was equal in value to the subject of his contract. In the case of *Forster v. Hoggart* (1), for aught that the purchaser could tell, the

(1) 81 R. R. 528 (15 Q. B. 155).

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PETO.

[*42]

lessee of No. 6 might have granted underleases, so as to make it impossible to show a good title in No. 7. It was to be observed, that the purchaser had contracted to buy Mr. Mackenzie's interest ; *but it was clear now that that gentleman would have had no defence to an action of ejectment. The title therefore was bad, and would not be forced upon a purchaser.

Mr. Bacon and *Mr. Piggott* appeared for the petitioners, but were not called on by his Honour.

THE VICE-CHANCELLOR :

I have listened to the arguments of the purchaser's counsel, to see whether they could point out any practical difficulty or injury arising from this mistake, but they have been unable even to suggest any thing of the kind. It has been contended, indeed, that these wrong parcels, having been introduced in the lease of No. 7, the lessee had no interest in the property ; but that is clearly an erroneous view of the law. Mr. Mackenzie was in possession, and had a good title, subject to an imperfection, which he was at any time entitled to have had remedied. Then, it has been said, that underleases may have been granted to nobody knows who ; but the rightful owner has all along been in the actual possession of the property. The title is clearly good, subject to one defect arising from a mere clerical error, which the order of the Court has effectually cured. I am of opinion, therefore, that the purchaser is bound to complete his contract, and shall make an order to that effect.

1854.
Jan. 23.

BARRETT v. RING (1).

(2 Sm. & G. 43—46.)

STUART,
V.-C.
[43]

It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. IV. c. 126, s. 39 ; even where the offer required has not, through inadvertence, been made to the adjoining owner, and it is in evidence that he insists on his right, the purchasers who had spent money on the land making no objection to the title, and being content to take such estate as the trustees could convey.

THE plaintiffs, Messrs. Barrett and Watson, are the lessees, under the Corporation of the Sons of the Clergy, of certain lands situate

(1) The purchasers as lessees of the adjoining land appear to have been entitled to a tangible interest in this right of pre-emption attached by the Act to the ownership of the adjoining

land, since that ownership was practically vested in them by the building lease to the extent of the term of 99 years thereby granted.—O. A. S.

on the south side of the junction turnpike-road from Kentish Town to Upper Holloway, which they had taken for a long term of years for building purposes.

BARRETT
v.
RING.

The defendants are the trustees of that road, appointed to put into execution the Acts of Parliament for making the road and managing the affairs relating thereto by divers Acts of Parliament, particularly the 3 & 4 Will. IV. c. c., intituled "An Act for continuing certain powers to the Trustees of the Road from Kentish Town to Upper Holloway, in the county of Middlesex."

A bank or slip of land, of the width of a few feet, between the road and the lands leased to the plaintiffs, was the property of the defendants.

Prior to the date of the contract next mentioned, the plaintiffs commenced the erection of a messuage, part of which they had, in ignorance of the defendants' rights, erected on the bank or slip of land between the lands demised to them and the road, and they used the whole frontage towards the road as their own.

By the General Turnpike Act, 3 Geo. IV. c. 126, s. 67, three trustees of any turnpike trust present at a meeting are authorised to manage the affairs of the trust; and by the 39th section of that Act, the trustees are authorised to sell such parts of the lands vested in them as shall not be wanted for the purposes of the roads, after having first offered the lands to the owners of the adjoining lands, but the refusal of such owners to purchase is to be verified by affidavit, in manner provided by the Act.

Three trustees on behalf of the trustees, and the plaintiffs, on the 11th of August, 1852, entered into a written agreement, whereby, in consideration of 125*l.* to be paid by the plaintiffs to the trustees, the trustees agreed to sell to the plaintiffs all the land on the south side of the junction road, marked out in a plan, being the bank or slip of land between the land of which the plaintiffs were lessees as aforesaid and the road; and the trustees agreed to convey the same land, but were not to deduce title thereto.

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After this contract was signed, the plaintiffs, with the privity of the defendants, and in execution of the scheme of building intended to be carried out by them upon the slip of land and the land contiguous thereto demised to them, continued to erect, partly upon the slip of land comprised in that contract, and partly upon the contiguous *land, a large messuage intended for a public-house. This they did upon the faith of the contract of the 11th of August, 1852.

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v.
RING.

In consequence of a correspondence, subsequent to the date of the agreement, with the solicitors for the Corporation of the Sons of the Clergy, who claimed to have the slip of land conveyed to them, the defendants declined to convey it.

The plaintiffs, thereupon, instituted this suit, with a prayer for the specific performance of the agreement, in the usual form.

The cause now came on upon a motion for a decree.

Mr. Malins and *Mr. W. D. Lewis*, for the plaintiffs, said that the plaintiffs did not object to the title of the trustees, and were satisfied to take such estate as they could convey to them.

Mr. Bovill, for the defendants, objected, first, that the suit was defective for want of parties, because the Corporation of the Sons of the Clergy, the lessors of the plaintiffs, were seised in fee of the lands adjoining to the bank or slip of land in question, of which the plaintiffs were only lessees; and it appeared in evidence that no offer of the land had been made to that Corporation, according to the requisition of the 89th section of the 3 Geo. IV. c. 126, and no evidence of any such offer was before the Court; whilst, from the evidence in the cause, it appeared that the Corporation claimed to be purchasers. And he submitted that a public duty was imposed on the defendants, which they had accidentally overlooked. Under these circumstances, he submitted that the plaintiffs, who must be assumed to be aware of the prohibition as well as the defendants, had no right to the extraordinary interposition of the Court in decreeing specific performance; but that the plaintiffs must be left to obtain such remedy in damages as they could obtain in an action at law.

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The VICE-CHANCELLOR said, the defendants who had entered into this contract must be presumed to have entered into it with full knowledge of the prohibition, and it was not competent for them to set up, as an objection specifically to perform their contract, the *jus tertii* of which they were then cognizant. The plaintiffs had expended money on the faith that the sale to them would be completed, and were satisfied with the defendants' title, and to accept such title as they could convey to them. The sale would be, in effect, subject to whatever right the Corporation of the Sons of the Clergy might, if they were advised to proceed *in rem*, be able to substantiate against the lands in the possession of the plaintiffs as purchasers; and if the Corporation should think fit to proceed

against the trustees for damages, it might do so; and it was not for this Court to provide against any such consequence to the defendants of the specific performance of their agreement. The decree must be for specific performance, with costs.

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RING.

IN THE MATTER OF CLOSSEY (1).

(2 Sm. & G. 46—47; S. C. 18 Jur. 222; 2 W. R. 183; 2 Eq. R. 52; 22 L. T. O. S. 253.)

1854.
Jan. 20.

STUART,
V.-C.

[46]

There being no satisfactory proof that the persons were living for whose lives certain hereditaments were held, the COURT, on the application of the remainder-man, made an order under the 6 Anne, c. 18, s. 1, requiring the tenant *pur autre vie* to produce the persons in question at a time and place specified in the order.

THIS was a motion under the 6 Anne, c. 18, intitled “An Act for the more effectual Discovery of the Death of Persons pretended to be alive, to the prejudice of those who claim Estates after their Death.”

The form of the motion was as follows: “That the said William Byrne be ordered, on the 1st day of February next, provided the order of this Court for that purpose be served upon him ten clear days previously, to produce and show—at the door of the parish church of St. Peter, in Liverpool, between the hours of eleven in the forenoon and one in the afternoon, to Malcolm M’Eachan, of Liverpool, cork merchant, and Thomas Dobell, of Liverpool—Elizabeth Clossey, widow, Jane Ann Galway, and Elizabeth Ann Galway, the persons named in the lease of the 30th of November, 1791, or one or more of them.”

Mr. Cairns, for the motion, stated the facts as they appeared on affidavit. In June, 1849, a Mr. William Johnson, of Liverpool, purchased at a sale by auction, in Parkgate, in Cheshire, a house and offices in the same town. In the particulars of sale the property was described to be occupied by a Miss Storer, claimed to be in lease for one life, then sixty years of age; but no evidence of the lease was in the possession of the vendor. Subject to the existence of the said lease, dated 30th of November, 1791, the house and premises were conveyed to the purchaser. In July, 1852, it appeared that a Mr. Whitehead was in possession, upon whom Mr. Johnson served a notice, dated the 27th of July, requiring him for the future to pay him the rent, inasmuch as he had applied to Mr. William Byrne, of 7, Shoe Lane, Dublin, bone merchant, who

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In re
CLOSSEY.

claimed to be tenant of the house *pur autre vie*, for proof that the said life was in being; but that Mr. Byrne, having returned no reply to such application, it was to be presumed that the life had dropped. Mr. Byrne, however, threatened to distrain for the rent due in September, 1852; upon which it was paid to his agent by Mr. Whitehead. On the 5th of August, 1853, Mr. Johnson caused a notice to be served on Byrne, requiring evidence that the life was in being, and to be informed of his or her address within a month. On the 3rd of November, 1853, Byrne wrote to the purchaser's solicitor informing him that he had reason to believe the persons for whose lives he was entitled to hold the property in question were living, and resident in England; but that, if it could be shown that they were dead, he would readily surrender the property. In September, 1853, the rent was again paid to Byrne's agent. Under these circumstances the present application was made to the Court. A similar order had been made in *Re Lingen* (1).

The VICE-CHANCELLOR directed the order to be made in the form mentioned in that case.

1854.
Jan. 23.

JORTIN v. THE SOUTH EASTERN RAILWAY COMPANY.

(2 Sm. & G. 48—74.)

[The decree in this case was subsequently affirmed by the Court of Appeal as reported in 6 D. M. & G. 270, but was ultimately reversed by the House of Lords as reported in 6 H. L. C. 425, under the name of *The Directors, &c. of the S. E. R. Co. v. Jortin.*]

1854.
Jan. 20.

DIMES v. STEINBERG.

(2 Sm. & G. 75—86.)

Bill by one of the next of kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the Ecclesiastical Court to recall the probate: Held maintainable in this Court, and demurrer for want of equity overruled.

[Applications of this kind should now be made in the Probate Division.]

(1) 12 Sim. 104. The order commanded the lessee to produce the cestui que vie at the Bar of the Court at the sitting of the Court at 10 o'clock in the morning of the 1st of May, 1841. —O. A. S.

MERCER'S CASE.

(2 Sm. & G. 87—90.)

[Reported on appeal in 5 D. M. & G. 26. See now the Companies Act, 1862, s. 115.]

1854.
Jan. 19.

THORP *v.* OWEN (1).

(2 Sm. & G. 90—95; S. C. 23 L. J. Ch. 286; 18 Jur. 641; 2 W. R. 208.)

1854.
Jan. 30.

A testator seised of lands in common socage, and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use, and, after her decease, devised his real estate to his then male heir and his heirs, in strict tail male: Held, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law.

STUART,
V.-C.
[90]

THE suit was instituted, among other objects, to obtain the determination, by the Court, of the construction of a will, which was in the following words: "This is the last will and testament of me, Henry Owen, of &c. I desire everything to remain in its present position during the lifetime of my wife, for her use and benefit; and, after her decease, I devise my real estate to my then male heir and his heirs, in strict tail male; and I wish my personal estate to be then equally divided among all my children; and I appoint my friends, James Bridger, and his brother George Bridger, both of &c., my executors, hereby revoking all former and other wills, and declaring this only to be my last will and testament, dated the 26th day of June, 1841. I give the above devise to my wife, that she may support herself and her children according to her discretion, and for that purpose."

The testator died on the day of the execution of the will, leaving his widow and eleven children—five sons and six daughters—surviving. The eldest son was at that time upwards of thirty, and the youngest child about ten years of age; several of the children were married in the lifetime of the testator.

The executors named in the will renounced probate; *and letters of administration with the will annexed were granted to the widow.

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The bill was filed by the younger sons, and some of the daughters, and the husbands of the married daughters, against the widow, the heir-at-law, and the other children of the testator; and prayed the execution of the trusts of the will, and a declaration of the rights of the parties.

(1) *Garland v. Beverley* (1878) 9 Ch. D. 213, 47 L. J. Ch. 711, 38 L. T. 911.

THORP
v.
OWEN.

At the hearing of the cause, the common inquiries with respect to the family and the accounts of the estate were directed.

The cause came on for further directions in 1843, and was twice argued before Sir James Wigram. The argument occupied five days. That learned Judge delivered an elaborate judgment on the principal point then raised, and held, that the widow took an absolute interest for her life in the real and personal estate of the testator (1).

The cause was referred back to the Master, and afterwards became attached to this branch of the Court.

Mrs. Owen the widow died on the 14th of December, 1853.

A petition was presented, shortly after the widow's death, by the plaintiffs, stating the will, and the various proceedings in the cause, and asking for an order disposing of all the interests of the parties in the cause.

It appeared from the Master's report made in the cause, that the testator was, at the time of his decease, seised of certain freehold lands in Essex, held in free or common socage tenure, and that he was also seised of certain other freehold lands in Kent, held in gavelkind.

The petition asked, among other points, for a declaration of the rights of the sons of the testator in the real estate of which he was seised at the time of his death, both as to such part thereof as was of free or common socage tenure, and as to such part thereof as was of gavelkind tenure.

Mr. Bacon and Mr. Josiah W. Smith, for the petitioners:

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* * No objection arises from the use of the word "heir" in the singular number. It is laid down by Lord Coke (2), and by Blackstone (3), that, in coparcenary, whether by the common law or by custom, all the parceners make but one heir. And, accordingly, in *Chambers v. Taylor* (4), the daughters were held entitled to take under the designation of heir female. There is indeed an authority, which might seem at first sight to favour the heir at common law, namely, Co. Litt. 10 a (5).

(1) 62 R. R. 253 (2 Hare, 607).

(2) Co. Litt. 163 b.

(3) 2 Com. 187.

(4) 45 R. R. 94 (2 My. & Cr. 376).

(5) The passage from Lord Coke here referred to, is as follows: "And here our author is to be understood to speak of heirs when they are inherit-

able by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, the remainder to the

And Mr. Hargrave appears to have assented to and illustrated the authority of the text in his note on the passage (1).

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OWEN.
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The *dictum* of Lord Coke, and the illustration of it by Mr. Hargrave, are opposed to the language of Lord HARDWICKE in *Roberts v. Dixwell* (2), who decided in favour of the heir at common law, expressly on the ground that it was an executory trust in which the Court is in the habit of construing technical words more liberally than in the case of trusts executed, or direct devises of legal estates. * * To construe a devise of gavelkind land to testator's heir as a devise to his heir at common law, is to translate a technical word into words of a totally different import; it is to translate the word "heir" into the person who would have been heir if the land devised had been of socage instead of gavelkind tenure.

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Mr. Malins and *Mr. Southgate* for John Frederick Owen, the heir-at-law at common law, said, they relied on Co. Litt. 10 a, and Mr. Hargrave's note thereto, * * and were proceeding to argue the case on behalf of Mr. J. F. Owen, the heir at common law, but were stopped by the COURT.

Mr. Osborne, *Mr. Toller*, *Mr. Nicholls*, and *Mr. Smale*, were for other parties to the cause.

THE VICE-CHANCELLOR said:

It has been long settled, that where a testator devises lands to his heir male, he must be held to mean his heir male at common law. The point is concluded by authority. Lord COKE, in the passage which has been referred to, has said it, and Mr. Hargrave right heirs of B. and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent."

(1) Mr. Hargrave's note 53 to Co. Litt. 10 a, is as follows: "Acc. Rob. Gavelk. pp. 117, 118, of the 1st and 2nd editions, but pp. 156 and 157 of the 3rd edition, and the authorities there cited. The reason seems to be, that, though the subject of the gift is customary land, the heir at common law is presumed to be meant, unless words are added to describe the customary heir. But if such special words are used the presumption fails, and

then it is said, that, though the subject of the gift is common-law land, yet the customary heir shall be preferred. On this principle Lord Chancellor COWPER, in a case before him, declared, that if one, having borough English land and also lands at common law, devises the latter to his heir by the custom of borough English, this will be a sufficient description of the youngest son, though not heir at common law, and though the devise is not of the customary but of the common-law land; and that a like devise to gavelkind heirs would entitle all the sons: (2 Vern. 732; and Prec. in Chan. 464).

(2) 1 Atk. 610.

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assents to the proposition. Robinson, in his work on Gavelkind (1), says, that even where there is a devise of gavelkind lands to the heirs or right heirs of J. S., who has issue four sons, and dies, the eldest son of J. S., who is the heir according to the common law, shall take; and he notices that this principle applies to lands held in borough English.

The principle is carried further, for, in *Wright v. Atkyns* (2) there was a devise and bequest of freehold and leasehold estates together, in favour of the devisor's heir; and Lord ELDON held, that the leasehold as well as the freehold vested in the heir as *persona designata*. The same principle was acted on by Lord ALVANLEY, in *Gwynne v. Muddock* (3).

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As to the argument founded on the modern decisions having overruled the opinion of Lord Coke, that the person to take under a gift to heirs female must be heir general as well as heir female, no doubt it has been held, ever since the case of *Wills v. Salmon* (4), that the opinions of Lord Coke and Mr. Hargrave on that point are no longer the law. But it seems a whimsical thing to say, that the opinion of Lord Coke and Mr. Hargrave, applicable to the present case, is to be discredited and overruled, because their opinion on another point, entirely different and inapplicable to this case, had not been followed in modern times.

Declare that John Frederick Owen, the eldest son and heir male according to the common law, is entitled to the real estate, as well that which was of free or common socage tenure as that which was of gavelkind.

1854.
Jan. 25.

EX PARTE GREENWOOD.

(2 Sm. & G. 95—114.)

[Reversed on appeal as reported in 3 D. M. & G. 459.]

1854.
Jan. 12.

WOOD v. MIDGLEY.

(2 Sm. & G. 115—124.)

[Reversed on appeal as reported in 5 D. M. & G. 41.]

(1) P. 156 of 3rd edit.

(2) 13 R. R. 199 (19 Ves. 299).

(3) 9 R. R. 327 (14 Ves. 489).

(4) 2 Bl. 87.

WARD *v.* WARD.

(2 Sm. & G. 125—135; S. C. 18 Jur. 529.)

A policy of assurance on his own life was effected by a defaulting trustee with the sanction of the Master, on a proposal to compromise a suit for restoring the trust fund; but the trustee died before the Master made his report, or finally approved of the proposal for compromise: Held, that the proceeds of the policy were not general assets of the trustee, but primarily applicable to compensate the loss by the breach of trust.

1854.
Jan. 27.STUART,
V.-C.
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By an indenture of settlement executed on the marriage of Henry Ward, since deceased, and Mary his wife, dated the 23rd of March, 1830, certain trust funds belonging to the lady were vested in two trustees, upon trust for the benefit of Mr. Henry Ward and Mary his wife successively for life, and for their children after them. In the year 1834, the original trustees named in the settlement of 1830 retired from the trust, and Sir Samuel Rush Merrick, since deceased, and Mr. William James Ward, a solicitor, were appointed the trustees of the settlement in their stead. The trust funds consisted of 664*l.* 4*s.* 6*d.* Three-and-a-quarter per Cent. Annuities, which were vested in the names of Sir Samuel Rush Merrick and Mr. William James Ward in the Bank books, and of a sum of 400*l.* formerly invested upon mortgage, called Tipton's mortgage, which was afterwards paid off. By the consent of Sir S. R. Merrick the whole of the trust funds came into the hands of Mr. William James Ward, and so remained.

Mr. Henry Ward died in 1838, leaving Mrs. Mary Ward, his widow, him surviving.

Sir S. R. Merrick died in 1848, and Messrs. Abraham Kirkman and T. W. King were his executors.

There were four infant children of Mr. Henry Ward and Mary his wife.

On the 16th of August, 1850, a bill was filed by the four infant children of Mr. Henry Ward and Mary his wife, by Mr. William Washbourne as their next friend, against Mr. William James Ward, Messrs. Kirkman and King, the executors of Sir S. R. Merrick, and Mrs. Mary Ward, the widow. By the bill, the above circumstances were stated, and it was prayed that accounts and inquiries might be directed, to ascertain of what the trust moneys and property subject to the trusts of the indenture of settlement *consisted, and of what was due from the defendants Mr. William James Ward and the estate of Sir S. R. Merrick respectively, in respect thereof. The Court was asked to declare that the estate of Sir S. R. Merrick was bound to make good to the plaintiffs and the other parties

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beneficially interested in the settlement what (if any) loss might be sustained in consequence of the trust moneys or property having been allowed by Sir S. R. Merrick, in his lifetime, to come into or remain under the sole control of the defendant William James Ward; and that what, on taking the accounts might be found to be due from the defendant William James Ward might be paid by him personally; and that what, on taking the same accounts, might be found to be due from the estate of Sir S. R. Merrick might be paid by the defendants Abraham Kirkman and T. W. King out of the assets of Sir S. R. Merrick, if they should admit assets, and if not, then out of his assets in a due course of administration; and for the appointment of new trustees in the place of Sir S. R. Merrick and the defendant William James Ward.

No answers were put in to this bill, but Mr. William James Ward, who was a solicitor, was desirous that the proceedings should be suspended, and that he should be allowed time to pay the moneys in his hands; and on the 20th of November, 1850, he made a proposal in writing to the plaintiffs in the following terms: "In consideration of suspending proceedings in this suit, I propose to acknowledge liabilities to the sums of 135*l.* 13*s.* and 636*l.* 16*s.* 8*d.*, being the whole of the distributive share of Mrs. Mary Ward in the residue of her father's estate comprised in her marriage settlement, and the sum of 400*l.* formerly secured on Tipton's mortgage, and also comprised in such settlement, making together the aggregate principal sum of 1,172*l.* 9*s.* 8*d.*; and I propose, for better securing the same, to effect an insurance on my own life in the name of Mr. W. Washbourne, the next friend of the plaintiff, for the sum of 1,500*l.*; and further, to assure the repayment of the sum *of 250*l.*, being the first instalment of principal on the said aggregate sum of 1,172*l.* 9*s.* 8*d.*, together with 58*l.* 12*s.* 6*d.*, being the interest thereon on the 1st day of October next; and the payment of the like sum of 250*l.*, together with the interest on the unpaid principal of the said aggregate sum of 1,172*l.* 9*s.* 8*d.*, on the 1st day of October in every successive year; and the regular payment of the premiums on the said policy as they become due, by a warrant of attorney to confess judgment against me for the sum of 2,500*l.* The proposal to be submitted to the Master for his approval, and to be without prejudice to any existing liability in respect of the bond of my father and myself for 500*l.*, also comprised in the said marriage settlement. The executors of Sir S. R. Merrick to appear if necessary."

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This proposal of Mr. William James Ward was accepted by

Mrs. Mary Ward the defendant, and by Mr. W. Washbourne, on behalf of the plaintiffs, subject to the approval of the Court; and proceedings in the suit were suspended.

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By an order, made upon the petition of the plaintiffs on the 15th of February, 1851, it was referred to Sir W. Horne, the Master, to inquire and state to the Court whether it would be for the benefit of the plaintiffs that the proposal should be accepted or not, or whether any or what other proposal should be accepted.

On the 11th of March, 1851, the Master required the London agent of the defendant Mr. William James Ward to inquire of him whether he could not give some better security than he had offered in his proposal.

At a subsequent attendance, on the 22nd of March, 1851, Mr. Ward's agent stated to the Master that he was unable to give any better security than that which he had offered; and, it appearing that Mr. Ward had not then insured his life, and that the sum due from him in respect of the trust-moneys exceeded the sum of 1,500*l.* mentioned in his proposal, the Master refused to entertain the proposal, until Mr. Ward had effected an insurance on his life *with the Legal and General Life Assurance Society for the sum of 2,000*l.*

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Some delay having taken place in effecting such insurance, the London agents of the plaintiffs in the suit made several applications to the London agent of Mr. Ward, requesting that the insurance might be at once effected; and in answer to a letter to such effect, of the 24th of April, 1851, Mr. Ward's agent replied on the 25th of April, 1851, as follows: "I have communicated your letter of the 24th instant to Mr. Ward, the defendant; and he informs me, in reply, that he intends being in town on Friday next, for the purpose of appearing before the medical officer of the Insurance Company."

On the 6th of May, 1851, Mr. Ward's agent informed the plaintiffs' agent that Mr. Ward had been before the medical officer of the Legal and General Assurance Society, and promised that, as soon as the proposal should be accepted, he would again write to them.

Upon inquiries subsequently made by the plaintiffs' agents at the Assurance Office, they were informed that Mr. Ward's proposal had been accepted, but that he had not paid the first premium; they, therefore, on the 15th of May, 1851, wrote to Mr. Ward's agent a letter, which was to the following purport: "We understand that Mr. Ward's proposal for the insurance of his life for

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2,000*l.* has been accepted ; and we, therefore, trust that he will at once pay the premium, and complete the insurance, as we shall take out a warrant to proceed before the Master immediately the offices open."

On the 29th day of May, 1851, a warrant, which had been previously taken out for proceeding on that day, was attended before the Master, when he was informed by the agent for Mr. William James Ward that the insurance would be immediately completed ; and the Master required that any further proceedings under the order should be attended before him on behalf of the defendants Messrs. Kirkman and King.

[129] Mr. William James Ward paid the premium, and completed the insurance on his life for 2,000*l.* on the 30th of May, 1851, in his own name.

On the 6th of June, 1851, the next warrant for proceeding under the order was attended before the Master by the solicitors of all the parties. The solicitor for the defendants Messrs. Kirkman and King then required on their behalf, that, in the event of the Master reporting in favour of any proposal of the defendant William James Ward, the same should be carried into effect without prejudice to any defence which Messrs. Kirkman and King might have to the suit ; but the Master refused to allow any proposal of the defendant William James Ward to be carried into effect on such terms ; and he required, as a condition of his approving of any such proposal, that Messrs. Kirkman and King should concur in the necessary deed for carrying the proposal into effect, not only for the purpose of admitting their liability in the same suit, but also in order that they might by such deed covenant to make good the several payments of principal and interest, and the future premiums on the policy of insurance which had been effected, in the event of Mr. William James Ward making default therein. The solicitor for Messrs. Kirkman and King declined to accede to such requisition, and the Master adjourned the proceedings for the purpose of allowing him to re-consider the matter.

No further proceedings were had under the order ; and Mr. William James Ward died on the 11th of October, 1851.

Mrs. Harriet Maria Ward was the sole executrix of his will, and she proved the same in March, 1852.

The sum of 2,000*l.* secured by the policy, became payable by the Legal and General Life Assurance Society upon the death of Mr. Ward.

Under these circumstances, the infant plaintiffs in the original suit filed a bill of revivor and supplement by Mr. *William Washbourne, their next friend, against Mrs. Harriet Maria Ward, the executrix of Mr. William James Ward, the defaulting trustee, certain officers of the Legal and General Assurance Society, Messrs. Kirkman and King, and Mrs. Mary Ward, the mother of the plaintiffs, alleging that the insurance for 2,000*l.* on the life of Mr. William James Ward had been effected in the name of Mr. Ward himself, but that it was fully understood and agreed, by and between all parties, that the insurance was to be in lieu of and substitution for the insurance for 1,500*l.* mentioned in Mr. Ward's proposal of the 20th of November, 1850, and that the same should be assigned to Mr. William Washbourne, the next friend of the plaintiffs, as soon as the proposal of Mr. William James Ward should be finally approved of by the Court; and that, in the meantime, the same should stand as a security for what might be found due from Mr. William James Ward in the suit; and that, in fact, the Master would have long before reported against the acceptance of the proposal if Mr. Ward had not effected such insurance. The plaintiffs also alleged that the proceedings in the suit against Mr. William James Ward had been suspended, first, in consequence of his having made the proposal, and afterwards, in consequence of his having effected such insurance; and that such suspension of the proceedings was of the utmost importance to Mr. Ward, inasmuch as he was entirely unable to have paid the amount due from him in respect of the trust moneys, and that such inability to pay, and the publicity which would have been given to his breaches of trust if the suit had proceeded, would have been fatal to his practice as a solicitor, which was very considerable; and also alleging, that, to obviate any doubt that might thereafter arise respecting the insurance, and the plaintiffs' lien thereon, their agents, on the 14th of August, 1851, applied to Mr. Ward's agent to have the policy of insurance deposited in their hands, with a memorandum in writing acknowledging that it was so deposited to secure what might be *found due from Mr. Ward in the suit, and that his agent had promised to mention the subject to him, but that he was prevented doing so by the serious illness of Mr. Ward, which terminated in his death.

The prayer was for the usual revivor of the suit against Mrs. Harriet Maria Ward, and for a declaration that the plaintiffs and the other persons interested under the said settlement were entitled to a lien on the moneys due on the said policy for the amount

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which should be so found due from the estate of Mr. Ward; and that the policy moneys might be secured in Court; and for an injunction restraining Mrs. Harriet Maria Ward from receiving and from commencing any action at law against the Assurance Society in respect of the policy moneys; and also for restraining the Assurance Society from paying the same to the defendant Mrs. Harriet Maria Ward.

The defendant, Mrs. Harriet Maria Ward, by her answer, submitted that the reference to the Master not having been proceeded with at the time of the death of Mr. William James Ward further than it was, and that the Master never having made his report pursuant to the order, and the insurance for 2,000*l.* having been effected in the name of Mr. William James Ward himself, the right to that sum had vested in herself as his personal representative; and she submitted that the insurance for 2,000*l.* was not in substitution for the insurance for 1,500*l.* mentioned in the proposal of Mr. William James Ward, of the 20th of November, 1850. She denied that it was understood or agreed between any of the parties that the insurance for 2,000*l.*, or the policy for the same, should be assigned to Mr. William Washbourne, or to any other person, when the proposal should be finally approved of by the Court, or that it should stand and be a security for what might be found due from the defendant William James Ward in the suit; and she submitted that no binding agreement for the suspension of the proceedings was ever made on behalf of the *plaintiffs; and that the persons acting on behalf of the plaintiffs had been always at liberty to prosecute the proceedings when they might think fit.

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It also appeared from the answer of this defendant, that two creditor suits had been instituted for the administration of the estate of Mr. Ward, under the direction of the Court; that he had died entirely insolvent; and that, on the 15th of April, 1852, upon a motion coming on for an injunction before Sir James Parker, an arrangement was made, by which the Assurance Company paid to Mrs. Harriet Maria Ward 94*l.* 11*s.* 5*d.*, on her undertaking to employ the same in payment of the probate duty and proctor's charges on proving Mr. Ward's will; and that, on payment of the balance of the 2,000*l.* into Court in this cause, the officers of the Assurance Company were dismissed.

Mr. Wigram and *Mr. Amphlett* for the plaintiffs, submitted that the plaintiffs were entitled to have the sum representing the 2,000*l.*,

received on the policy, and now in Court, appropriated in the first place to make good the sums due from Mr. Ward under his breaches of trust. If a policy for the sum of 1,500*l.* only had been effected, it would clearly have been subject to a lien to make good the plaintiffs' fund; but the transactions show that all parties, in fact, treated and considered the insurance for 2,000*l.* as being in lieu of the insurance in the sum of 1,500*l.*; and if the latter was charged, the tacit agreement substituting the 2,000*l.* for the 1,500*l.*, charged the 2,000*l.* It was a matter of plain inference from the facts.

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If the charge on the fund did not exist, then the estate of Sir S. R. Merrick was liable to make good the defalcations of Mr. Ward, the funds having got into Mr. Ward's uncontrolled possession with the concurrence of Sir S. R. Merrick.

Mr. Bacon and Mr. Haynes for Mrs. Harriet Maria Ward, *the executrix of Mr. Ward, the defaulting trustee :

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The 2000*l.* arising from the insurance was payable to Mrs. Ward as the personal representative of Mr. Ward. The presumption is, that the amount secured was his own. The attempt to make out the plaintiff's equity to a lien on the amount fails. It may be admitted, that Mr. Ward proposed terms of compromise; but the Master rejected them, and suggested other terms; and it does not appear that the defendant Ward ever agreed to them, whilst the Master himself declared he should not assent to the terms, except with the concurrence by the representatives of Sir S. W. Merrick, which their solicitor expressly declined to give. There is, therefore, no contract by any one, upon which any party can fix, to charge the proceeds of the 2,000*l.* with a lien on behalf of the plaintiffs. All rested in proposal,—it was all negotiation, and it did not ripen into an agreement. But even if it should be held to have been an agreement, it was an agreement by infants with Mr. Ward; and since there could be no mutuality, it was in fact no agreement enforceable in equity: *Flight v. Bolland* (1); and if the right of lien be rested on the sanction of the terms by the Master, that sanction was never obtained.

Mr. Cooper, Mr. Rogers, and Mr. Ellis, for the representatives of Sir S. R. Merrick, were proceeding to argue the question of Sir S. R. Merrick's liability for the breaches of trust; but they were stopped by the Court.

(1) 28 R. R. 101 (4 Russ. 298).

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THE VICE-CHANCELLOR said :

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The counsel for Mrs. Ward, who is here representing the interests of the late Mr. Ward's creditors, have properly discharged their duty by endeavouring to sustain the proposition, that Mrs. Ward was entitled to the money received on the policy, as part *of his general assets. They contend that there was no such agreement as to bind Mr. Ward, inasmuch as the proposal was not so completely accepted as to make it binding on him. I think it was complete as far as regards him. The only question is, as to the other parties. There is no doubt about the facts.

The original bill was filed to make both the trustees liable for breach of trust. After that, Mr. Ward proposed certain terms for putting an end to the suit, the principal term being that he should effect an insurance on his own life for 1,500*l*. That proposal was so far accepted, that, on the application of the plaintiffs, there was a reference to the Master to inquire, on behalf of the infants, whether it would be for the benefit of the infant plaintiffs that the proposal should be accepted. The Master seems to have approved of the proposal in every respect, except as to the amount for which the policy was proposed to be effected, and he required the insurance to be for the sum of 2,000*l*. instead of 1,500*l*. This was an alteration that introduced no new term as to the principle of the arrangement, but only as to the amount; and it was so completely accepted that the policy for this amount so proposed by the Master was actually effected; and the only thing that remained was to prepare a proper deed; and the Master required the other trustee to attend for the purpose. Now, although this insurance was in Mr. Ward's name, yet being effected for a specific purpose on his own proposal, and with the Master's approbation, and in the mode which the Master thought proper, and for the benefit of all parties, I must hold that the policy was, in his (Ward's) hands, as effectually dedicated to the purpose as if it had been for 1,500*l*.; and the plaintiffs have the same rights against Ward's representatives, as completely as they would have had against Ward if he were alive.

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There is another view of the case, which would make it impossible to allow the money produced by the policy to *go to the general body of creditors. How had the money been produced? It had been received upon a policy which had been effected as the fruit of this litigation. It is the produce of the diligence of these plaintiffs; and it would be inequitable to deprive them of it. But it was said, that the plaintiffs should be deprived of it, because the policy was

in the hands of Ward's personal representative, who was legally entitled to receive the amount. But where the cestui que trust is entitled to relief against his trustee, which he seeks, as plaintiff, to obtain, and a particular fund is created to answer the relief, and so far appropriated to make good the demand, it would be a very dangerous doctrine to hold, that the plaintiff should lose the fruit of his diligence.

The Court must declare that the policy monies are subject to replace such sums as are due from the estate of Mr. W. J. Ward in respect of the funds in his hands under the settlement. The plaintiff's costs of both suits, and the costs of Mrs. Ward, as executrix of the supplemental suit, must be paid, in the first place, out of the fund and out of what is due from Mr. Ward, the deceased trustee, for principal and interest; and the Court will direct payment of what shall be found due to be made out of the residue of the fund. If there be any surplus let it be paid to the executrix, she undertaking, in case of the fund being insufficient, to apply for a return of probate duty, and to pay the same into Court in this cause.

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JOHNSON v. WEBSTER.

(2 Sm. & G. 136—140.)

[Reversed on appeal as reported in 4 D. M. & G. 474.]

1854.
Feb. 12.

DIPLOCK v. HAMMOND.

(2 Sm. & G. 141—146.)

[Affirmed on appeal as reported in 5 D. M. & G. 320.]

1854.
Feb. 16.

HATCH v. SEARLES.

STANWAY'S CASE.

CONWAY'S CASE.

(2 Sm. & G. 147—157; S. C. 23 L. J. Ch. 467; 2 W. R. 297; affirmed 24 L. J. Ch. 22; 3 W. R. 49.)

1854.
Feb. 8, 9, 22.

Giving a blank acceptance is only *prima facie* evidence of an authority to the person to whom it is given to fill up the bill for the amount to which the stamp extends; and where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than the drawer or indorser, who had given no value for the bill.

The holder of a bill, who, without any express notice of any circumstance of suspicion, took the bill, not in the ordinary course of business and not relying on the security, required evidence of title in the drawer to negotiate

On Appeal.
Nov. 16.

KNIGHT
BRUCE,
TURNER,
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the bill, which deceived him, has only his remedy against the drawer personally who deceived him, and he can have no better title on the bill than the drawer had (1).

A person, claiming to be a creditor under a decree to administer the testator's estate, having failed to establish his debt, after a long and expensive examination of witnesses, was ordered to pay the costs of the proceedings.

An order to administer the estate of a testator, Isaac Searles, under the direction of the Court, having been made, creditors and claimants upon the estate were, by advertisements, required to come in and prove their claims before the chief clerk. Mr. Stanway went in before the chief clerk and sought to prove as a creditor upon a bill of exchange for 100*l.*, dated the 18th day of February, 1852, drawn by Mr. Curtis upon, and addressed to, Mr. Isaac Searles, the testator, as of "Old Kent Road," and accepted by the testator for 100*l.*, and payable two months after date, to the order of Mr. Curtis, and by him indorsed to a Mr. Wallis, and by him indorsed to Mr. Stanway.

Mr. Conway also sought to prove as a creditor on the estate upon a bill of exchange for 50*l.*, dated the 12th of February, 1852, drawn by Mr. Curtis upon, and addressed to, the testator as of "Old Kent Road," and accepted by the testator, and payable six months after date; this bill, having been indorsed by Mr. Curtis, was by him paid to Mr. Conway.

The chief clerk, upon the circumstances in evidence before him disallowed both claims.

These cases now came on for argument by adjournment from chambers, by way of motion, that the certificate of the chief clerk might be varied by allowing these claims.

The evidence upon these claims was conflicting, but the following are the facts as they appeared to the Court.

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The testator, a young medical student, was on terms of intimacy with Mr. Curtis.

A few days before the testator left England for Demerara, Mr. Curtis being in want of money, the testator, in order to assist Mr. Curtis, at his request wrote his name across two blank pieces of paper, impressed as bills of exchange with a stamp, for 3*s.* 6*d.* each, and gave them to Mr. Curtis. It was a matter in dispute, whether they were absolute gifts to Mr. Curtis, or merely authorities to use the testator's name for the accommodation of Curtis; and it was also

(1) Bills of Exchange Act, 1882, s. 138, 50 L. T. 670; *France v. Clark* 20. *Cartier v. White* (1882) 20 Ch. D. (1884) 26 Ch. Div. 257, 53 L. J. Ch. 225 (affd. 25 Ch. Div. 666, 54 L. J. Ch. 586, 50 L. T. 1.

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in dispute, whether Mr. Curtis was in any respect a creditor of the testator for sums paid for him. The testator left Southampton on the 17th of February, 1852, for Demerara, where he died on the 11th of April following. Mr. Curtis retained the two acceptances in his possession in blank until the 18th of April, 1852. On that day he filled up the acceptance for 100*l.*, in the presence of Mr. Wallis and Mr. Stanway; Mr. Wallis discounted the bill for 100*l.*, not giving to Curtis the full cash for the amount less ordinary discount, but taking the amount into a running account between them, and making him some small advance on the transaction. Mr. Wallis discounted the bill with Mr. Stanway before it became due. On the 21st of April the bill became due, and was not paid. Under these circumstances, Mr. Stanway preferred the present claim to be admitted a creditor for the amount of the bill upon the testator's estate.

Mr. Curtis, in the month of April, 1852, discounted the bill for 50*l.* with Mr. Conway. It did not appear whether Mr. Conway knew of the circumstances under which this acceptance had been given; but, not being satisfied with the bill, he took from Mr. Curtis a letter addressed to him by the testator, dated the 28th of October, 1851, as a document showing that the testator and Curtis were on such terms as to justify the latter in negotiating the bill.

It appeared, that, although the testator was dead prior *to the date when Curtis filled up the acceptances, the death of the testator was not known in England until after Mr. Stanway and Mr. Conway had discounted the bills. The address of the testator, as given in the bills, of "Old Kent Road," was the last address of the testator previous to his leaving England, but it was a mere lodging, and ceased on his leaving England to be his address.

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Both motions now came on together.

Mr. T. H. Terrell in support of Mr. Stanway's claim; and

Mr. Huddleston in support of Mr. Conway's claim:

The gift of these two blank acceptances to Curtis was an authority to him to fill them up to any amount which the stamp impressed on them would cover at any time. [On this point he cited *Tate v. Hibbert* (1), *Collis v. Emett* (2), *Russell v. Langstaffe* (3), *Schultz v. Ashley* (4), *Montague v. Perkins* (5), *Temple v. Pullen* (6), *Thornton v.*

(1) 2 R. R. 175 (2 Ves. Jr. 111).

(2) 1 H. Bl. 313.

(3) 2 Doug. 514.

(4) 42 R. R. 651 (2 Bing. N. C. 544).

(5) 94 R. R. 862 (22 L. J. C. P. 187).

(6) 91 R. R. 546 (8 Ex. 389).

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Dick (1), *Cox v. Troy* (2), *Usher v. Dauncey* (3), and other cases.] In *Wood v. Manley* (4) and *Wood v. Leadbitter* (5) it was held, that an authority coupled with an interest could not be revoked.

Mr. Malins and *Mr. Needham* for the plaintiffs, in support of the chief clerk's certificate, were proceeding to submit—first, that the right of *Curtis* to fill up the bill extended to the lifetime of the acceptor only, and ceased on his death; and secondly, that the claimant must be a *bonâ fide* holder to entitle him to be a creditor on the estate.

His Honour, however, stopped them, and said the impression on his mind was, that the certificate was right, and that both claims must be disallowed; but he would consider the authorities cited, and either give his decision to-morrow, or hear counsel for the respondents.

Feb. 9.
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THE VICE-CHANCELLOR now said :

The claim of *Mr. Stanway* to be admitted as a creditor for 100*l.* and interest, as the holder of a bill accepted by the testator, and the similar claim of *Mr. Conway*, as holder of an acceptance for 50*l.*, are supported and opposed upon evidence of such facts as leave no doubt upon my mind as to the way in which their claims should be disposed of. But, in the arguments in support of their claims, some propositions stated in the reported decisions of Judges of the very highest authority have been relied upon, and used in a sense inconsistent with the established principles of the law of contract. In the case of *Russell v. Langstaffe* (6), Lord MANSFIELD laid it down as clear law that the indorsement in blank of a note is a letter of credit for an indefinite sum. Subsequent authorities have held the amount to be defined by the limits of the stamp. In the latest case quoted before me at the Bar, *Montague v. Perkins* (7), the Lord Chief Justice JERVIS stated the law in these terms: "That the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the term to which the stamp extends." The proposition is stated in similar terms in many other cases. But it is always so stated with reference to the rights of a *bonâ fide* holder for valuable consideration

(1) 4 Esp. 270, see 24 R. B. 463.

(2) 24 R. B. 460 (5 B. & Ald. 474).

(3) 15 R. B. 729 (4 Camp. 97).

(4) 52 R. B. 271 (11 Ad. & El. 34).

(5) 67 R. B. 831 (13 M. & W. 853).

(6) 2 Doug. 514.

(7) 94 R. B. 862 (22 L. J. C. P. 187).

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without notice. The general terms in which the proposition is stated must be read with reference to the facts of the cases to which it was applied. As an absolute general proposition it cannot be maintained. And, although in the passage quoted in the last case, from the judgment of Lord Chief Justice JERVIS, it is stated in general terms and sounding as an absolute rule, yet the subsequent passages in the same judgment introduce proper qualifications, and say that giving a blank acceptance is only *primâ facie* evidence *of authority to fill up, and, being only *primâ facie* evidence, may of course be rebutted by evidence of the real nature and extent of the authority, and of the true terms of the contract, and of the whole transaction between the person who signs in blank and the person to whom the blank acceptance is given.

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Therefore the general proposition relied on in support of these motions does not absolutely govern, when the question is between the acceptor in blank and the person who receives it in blank from him, if the transaction between them is not supported by any valuable consideration. Independently of any other evidence of a contract between these two persons, the blank acceptance is an imperfect instrument, which, in itself, could create no contract, although *primâ facie*, but only *primâ facie*, it might imply some authority to one of the parties. As to a *bonâ fide* holder, the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he is fastened with notice of that imperfection. If the holder has notice of the imperfection, he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorsee who gave it in blank. But, if he be a *bonâ fide* holder without notice, as he must have taken the negotiable instrument in a perfect shape, and in terms a complete contract, without any notice, or any circumstances of suspicion to call for inquiry, which would be equivalent to notice, the law in favour of the rights of a *bonâ fide* holder of the negotiable instrument, apparently perfect as a contract, will not permit the acceptor to annul the effect of his own act upon evidence of a transaction to which the holder was not privy, and which may contradict the terms of the written contract to which the *bonâ fide* holder was justified in giving credit.

In the case of Mr. Stanway, which I have now to dispose of, the evidence entirely excludes the application *of the proposition much insisted upon. Mr. Stanway had full notice that the acceptance had been given in blank, and was, therefore, an imperfect instrument

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as between the late Mr. Searles, the acceptor, and Mr. Curtis, to whom it was given in blank. Mr. Stanway was himself present at filling up the blanks; and being thus fastened with notice of the transaction between Mr. Searles, the acceptor in blank, and Mr. Curtis, he acquired against the acceptor no better right than Mr. Curtis who gave no value for the acceptance. The transaction between Curtis and Stanway was one in which they each acted as principals; and upon that transaction the contracting parties were Curtis, Stanway, and Wallis, who, as they all had notice of the imperfection of the contract as to the acceptor, could obtain no further right against him than Curtis had.

As to the case of Mr. Conway, he is so far from being a *bonâ fide* holder without notice, that, instead of taking the 50*l.* acceptance in the ordinary course of business, he did not rely on the bill, but fortified his title by taking along with it a letter written by Searles, in October, 1851, as evidence of Curtis's title to the bill. Relying not on the title conferred by the bill itself as a negotiable instrument in the hands of Curtis, but requiring evidence of his title, and being deceived by the representation and defective evidence given to him by Curtis, his remedy must be against Curtis, with whom alone, upon the evidence, he can be held to have made any contract.

As to the case of both claimants being holders with notice, they are bound by the fraudulent misrepresentations on the face of both bills as to the residence of the acceptor Searles, who, having left the country to reside in Demerara, where he died, is described as living in the Old Kent Road.

[*155] These views of the infirmity of the title on both bills leave untouched the argument as to the revocation of the implied authority given to Curtis by the blank acceptance. If Curtis had given any valuable consideration *to Searles, there would have been room for the argument, that the authority, being coupled with an interest, was not revoked by the death of Searles. But there was no such valuable consideration. The mere possession of the blank acceptances by Curtis did not give him such a beneficial interest in them as to prevent a revocation by the death of Searles.

I must, therefore, hold that neither of these claimants is a creditor of the testator Searles, and must refuse the motion with costs.

[Mr. Conway appealed from this decision, as reported in 3 W. R. 49, but the LORDS JUSTICES affirmed the decision as follows:]

[3 W. R. 49] KNIGHT BRUCE, L.J., said, that upon the question of fact, whether

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Mr. Conway gave to Mr. Curtis 45*l.* or any other sum for the bill in question, he gave no opinion. Still, two questions remained independently of the question of law raised on the acceptance; first, was the bill available between Mr. Searles and Mr. Curtis, and was it a rightful act, as between Mr. Searles, whether dead or alive, and Mr. Curtis, for Mr. Curtis to deal with the bill by discounting it? He entertained no doubt that Mr. Curtis had no such right, and that he was a mere wrongdoer in dealing with the bill. The other question remained, whether Mr. Conway in discounting the bill had a better title than Mr. Curtis? That depended upon the question, whether Mr. Conway could be heard to say that he took the bill without notice of the nature of the title of the drawer? His Lordship then referred to the evidence that had been adduced, and said that he was of opinion that Mr. Conway did know or might have known the circumstances under which the bill was given, and that, if he did not know them, he must be taken in law to have known them. His title, therefore, was no better than that of Mr. Curtis. The conclusion, therefore, of the chief clerk, in which the VICE-CHANCELLOR concurred, was the correct one, and the application must be refused with costs.

TURNER, L.J., said, that one thing was clear—that there was no consideration between Mr. Curtis and Mr. Searles: and this made it incumbent on Mr. Conway to show that he was a *bonâ fide* holder of the bill, and that he gave value for it. That involved a consideration of what passed between Mr. Curtis and Mr. Conway at the time of discounting the bill, and what knowledge Mr. Conway had of the circumstances under which the bill was drawn. The deduction from the evidence was, that without saying that inquiries were actually made by Mr. Conway, justice required that it should be imputed to him that he made them. He therefore concurred with Lord Justice KNIGHT BRUCE.

The following notice of motion was subsequently served upon Stanway: [2 Sm. & G.
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“ That the costs and expenses incurred by the executors of Isaac Searles, in opposing the claim made upon the estate of the said Isaac Searles by Edward Stanway, for the sum of 100*l.*, before the chief clerk, and by him disallowed; and all other costs, charges, and expenses incidental to the same; and all costs, charges, and expenses incurred or paid in consequence of the said claim being

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—

made upon the estate of the said Isaac Searles, may be taxed and paid to the executors of the said Isaac Searles."

Mr. Malins now appeared in support of the motion.

Mr. T. H. Terrell opposed the motion. * * *

THE VICE-CHANCELLOR :

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This is a very important question. There is some *justice in the observation, that it has hitherto not been the practice to make a creditor, going into the Master's office to prove his debt, pay the costs of the attempt when unsuccessful. Under the old practice, however, the costs, generally speaking, could not be considerable, because the Master had no power to examine witnesses *vivâ voce*.

Recently, the Legislature has thought fit to give power to the Judge's clerk, that is, to the Judge himself at chambers, to take evidence. It is said, however, that the costs in question are not the costs of litigation; and that the creditor was prevented, by the order of this Court, from proceeding in a court of law, which was the proper tribunal, to establish his claim. The injunction was granted, because a court of law was not the proper tribunal, inasmuch as, when an administration suit is instituted, this Court, by its own proper jurisdiction, administers the assets in payment of debts or otherwise. Until the recent improvement in the practice, it was the duty of the Master to report on the debts; but when questions of difficulty arose, which not unfrequently happened, the Master having no means of settling the question, it was sent for adjudication before a jury, and the costs would in that case abide the result of the action at law.

To cure that infirmity, and to save expense and delay, the Legislature authorised the Judges, by their clerks, to take the evidence of witnesses, in order to rebut the claims preferred at chambers by creditors. In the present case, evidence was entered into, to contest the claim of *Mr. Stanway* upon the assets; expenses were incurred in chambers in determining the question, which were greatly increased by the necessity of entering into evidence, in order to disprove the alleged debt. The creditor, upon the evidence, failed to prove his debt. Who then is to pay the costs of that inquiry? I think, if I were to allow the assets in course of administration to be diminished by the costs of resisting this unfounded claim, I should be guilty of injustice *towards those who are entitled to the property of the testator. I shall, therefore, direct the costs of the executors incurred in resisting the claim, which the result has

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proved to be an unfounded claim, to be taxed and paid by the alleged creditor.

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It is said, I have no jurisdiction to make such an order, inasmuch as the creditor is not a party to the suit. I think he made himself a party by embarking in this litigation. If I have not the power to make him pay costs where he has put the estate to great expense by an improper claim, there would be a failure of justice, and if he had proved his debt he would have been entitled to costs. In my opinion I have the power and the means of enforcing the order.

GALLIMORE v. GILL.

(2 Sm. & G. 158—162.)

1854.
Feb. 23.

[Affirmed on appeal, as reported in 8 D. M. & G. 567, under the title of *Gallimore v. Gill*.]

WARBUTTON v. WARBUTTON.

(2 Sm. & G. 163—168.)

1854.
Feb. 25.

A power to lease and manage his real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect.

[Overruled, *Parker v. Sowerby*, 4 D. M. & G. 321; see 94 R. R. 750 (1 Dr. 488).]

IN RE POOLE BATHURST'S ESTATE (1).

(2 Sm. & G. 169—174; S. C. 18 Jur. 568; 23 L. T. O. S. 218.

1854.
Feb. 27.

STUART,
V.-C.
[169]

Where three trustees were named in a settlement with a power to the cestui que trusts, to nominate, substitute, or appoint any person or persons in the place of the said present or other trustee or trustees, who should die, &c.: Held, that an appointment of two persons only in the room of the three original trustees, was a valid appointment.

A QUESTION was raised on this petition, whether a deed appointing new trustees, dated the 10th of July, was a valid exercise of a power.

By an indenture of settlement, dated the 30th of December, 1777, between Henry Fane of the first part; Edward Buckley Batson and Ann Batson of the second part; and J. Batson, S. Batson, and David R. Michel of the third part, reciting, that a marriage had been agreed upon and shortly intended to be solemnised between the said Henry Fane and Ann Batson, it was agreed that the said

(1) See now the Trustee Act, 1893, s. 10 (2), which is retrospective and which (within certain limits) authorises

the number of trustees to be increased or diminished upon an appointment of a new trustee or trustees.—O. A. S.

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J. Batson, S. Batson, and D. R. Michel should stand possessed of certain monies out on mortgage, assigned by Mr. Henry Fane upon the trusts therein declared.

By a deed-poll, under the hand and seal of the said Henry Fane, reciting, that the said money, amounting to 7,000*l.*, was then due, with interest, it was witnessed, that, in consideration of 7,000*l.* expressed to be paid to the said Henry Fane by the said J. Batson, S. Batson, and D. R. Michel, their executors, administrators, and assigns, all those the said manors, &c. &c. which were demised by the said Bathurst to the Earl of Westmorland for 500 years, and which had become vested in the said Henry Fane for the residue of the said term, and the sum of 7,000*l.* due and owing to the said Henry Fane, with powers for recovering the same; to hold the same, and also the said sum of 7,000*l.* to the said J. Batson, S. Batson, and D. R. Michel, for the residue of the said term, subject to redemption, &c.

The deed contained the following power for the appointment of new trustees :

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“ In case the said J. Batson, S. Batson, and D. R. Michel, *or any of them, die, or be desirous to be discharged of and from the trusts thereby in them reposed as aforesaid, before the same trusts shall be fully performed and executed, or shall neglect or refuse to act in the said trusts, then and in any such case, and when and so soon and as often as the same shall happen, it shall be lawful to and for the said Henry Fane and Ann Batson, and the survivor of them, by any writing or writings, to be sealed and delivered by them or the survivor of them in the presence of and attested by two or more credible witnesses, to nominate, substitute, or appoint any other person or persons to be a trustee or trustees for the several purposes aforesaid, or any of them, in the place or stead of the said present or any succeeding or other trustee or trustees who shall so die or be desirous to be discharged of and from or shall neglect or refuse to act in the said trusts as aforesaid, and so, from time to time and so often as there shall be occasion, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees for the purposes aforesaid, or any of them, in the place and stead of the said persons, or any succeeding or other trustee or trustees who shall so die, or be desirous to quit and be discharged of and from or neglect or refuse to act in the said trusts.”

The marriage was solemnised on the 13th of January, 1773. Henry Fane, the husband, died in 1802.

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By a deed-poll, dated the 10th of July, 1811, under the hand and seal of the said Ann Fane, late Ann Batson, indorsed on the settlement, reciting, as the fact was, that the said J. Batson and D. R. Michel had departed this life, and that the said S. Batson was desirous of relinquishing the said trusts, and that the said Ann Fane was desirous of appointing her son Major-General Henry Fane and Charles W. Michel to be joint trustees of the said indenture in lieu of the said James Batson, S. Batson, and D. R. Michel; and reciting, that the said Henry Fane and Charles W. Michel had agreed to take on themselves the *said trusteeship, it was by the said deed-poll witnessed, that the said Ann Fane, by virtue and in exercise and execution of the power and authority given to her for that purpose by the said indenture, and of all other powers and authorities enabling her in that behalf, did, by that writing, under her hand and seal, attested by two credible persons, whose names were underwritten as witnesses to the reading and delivery thereof, nominate, substitute, and appoint the said Henry Fane and C. W. Michel to be trustees in stead of the said J. Batson, S. Batson, and D. R. Michel, of the several trust-moneys and premises which were assigned to and vested in them by the said indenture of settlement for the several purposes, and with all the powers and authorities expressed in and granted by the said indenture of settlement.

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J. Batson died in October, 1812, having appointed his sons his executors, who duly proved his will.

Charles W. Michel died on the 27th of May, 1827. Major-General Fane died on the 7th of February, 1828, having appointed his brother V. Fane and R. G. C. Fane his executors, but made no disposition of the trust estate.

A part of the lands in mortgage being required by the South Wales Railway Company for the purposes of their railway, an agreement was entered into between them and the tenant for life, Mr. Bathurst, for the purchase of the land required for a sum of 16,387*l.*, which was immediately afterwards paid by the Company into Court and invested in Consols. A petition was presented on the 22nd of July, 1851, by Mr. Bathurst, praying that so much of the said fund as should be necessary might be applied in paying off the said incumbrances; on the hearing of which, the Vice-Chancellor KNIGHT BRUCE, on the 26th of July, referred it to the Master to ascertain the incumbrances and the amount due for principal and interest. The order had not been drawn up, but it had been since

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ESTATE.

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ascertained that the amount of the incumbrances was 15,840*l.*, of which 840*l.* was due to the petitioner.

This petition was now presented, praying that the said incumbrances might be paid off out of the funds paid into Court by the Company.

Mr. Malins and *Mr. F. T. White* contended, that the appointment, in 1811, was valid. [They cited *Miller v. Priddon* (1) and other cases.]

Mr. Fane appeared for the executors of the subsequently appointed trustees.

Mr. Osborn for the South Wales Railway Company [cited *Meinertzhagen v. Davis* (2) and other cases].

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THE VICE-CHANCELLOR :

In cases of this kind the Court ought to be governed by the plain and sensible meaning of the language in which the power to appoint trustees is given. In the language of this instrument, I can see nothing inconsistent with the appointment of two trustees in lieu of three. It is objected, that the appointment of two trustees instead of three, which was made nearly forty-three years ago, was not a valid exercise of the power. Considering that the trusts have been administered ever since on the footing that the appointment was valid, I should feel considerable reluctance in disturbing it; because, if I were to hold that the appointment was invalid, everything that has been done in the trust during that period would be liable to be impeached. Fortunately, I do not find myself bound to arrive at any such conclusion. I think that the appointment of two trustees instead of three was not inconsistent with the language of the power, and that the representatives of the survivor of the two trustees so appointed are capable of giving a good discharge.

With respect to the authorities that have been cited it must be borne in mind, that, on questions of this kind, the Court must be a good deal governed by the selection of the *cestui que trusts*, the state of the property, and the time at which the appointment is brought to the notice of the Court. The case of *Fagg's Trusts* (3), and the *other cases decided by the VICE-CHANCELLOR OF ENGLAND

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(1) 91 R. R. 108 (1 D. M. & G. 335).

(3) 19 L. J. Ch. 175.

(2) 66 R. R. 88 (1 Coll. C. C. 345).

and Vice-Chancellor KNIGHT BRUCE, were decided on the circumstances under which those cases were brought to the notice of the Court. Cases frequently occur, in which it is necessary that the full number of trustees should be kept up; and other cases, on the contrary, where such a course would be attended with inconvenience to the interests of the cestui que trust. In this case I think the appointment was a valid exercise of the power, and that the representatives of the surviving trustee can give a good discharge; and I shall make a declaration accordingly.

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ESTATE.

YATES v. PLUMBE.

(2 Sm. & G. 174—175.)

A mortgagee being decreed to reconvey one undivided moiety of an estate included in his security (a part of the debt being satisfied) to the mortgagor, and being entitled to retain the title-deeds of the whole estate, is bound to covenant to produce the deeds.

1854.
Feb. 28.

STUART,
V.-C.
[174]

UNDER a decree of the Court, dated 8th of December, 1845, the defendants, who were mortgagees in possession of an estate called Prescotts, were ordered to convey to the plaintiffs one undivided moiety of the said estate, the conveyance to be settled at chambers in case the parties differed.

The property formed a part of a larger estate held under the same title-deeds, to which the defendants were entitled in fee. A question having arisen between the parties as to whether the plaintiffs were entitled to a covenant for the production of the deeds, or entitled only to attested copies, his Honour at chambers directed the opinion of the conveyancing counsel to be taken; upon which the matter was referred to Mr. Hayes, whose opinion is given below.

Mr. Follett, on a subsequent occasion, submitted to the Court that the plaintiffs were entitled only to have attested *copies. He cited the case of *Trodd v. Downes* (1). This was not the ordinary case where the vendor entered into a contract, which he would of course be bound to perform.

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Mr. Taylor appeared *contrà*.

The VICE-CHANCELLOR thought that the plaintiff was entitled to a covenant to produce the deeds.

(1) Seton on Decrees, p. 188.

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v.
PLUMER.

The following is the opinion referred to :

“ As I understand the facts, the muniments relate as well to the undivided moiety now to be conveyed as to other lands of which the defendants are owners in fee, and that such muniments are retained by the defendants as such owners. I think a covenant on their part to produce these muniments was properly introduced into the draft conveyance. In a similar case, Lord St. LEONARDS, when at the Bar, advised, that a part owner claiming the covenant should tender to the holder of the deeds a covenant in the usual form, and, on his refusal to execute, file a bill to have the deeds deposited for the use of both parties; but the covenant was conceded. These covenants are not of much value, unless a memorandum, to carry notice, be indorsed on the deeds, or on some material deeds or deed; but however important this may be, it can hardly be said to be the established practice.

“ WILLIAM HAYES.

“ Lincoln’s Inn, 22nd February, 1854.”

1854.
Jan. 25, 26.

SANDFORD v. JODRELL.

(2 Sm. & G. 176—185.)

STUART,
V.-C.
[176]

One of three trustees, who was alleged to have participated in a breach of trust, clearly committed by the others, being also executor of a cestui que trust: Held that a legatee of the cestui que trust was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust.

THE plaintiff Mr. Sandford, who was one of the legatees under the will and codicils of the Rev. John Holland, filed the bill in this cause on behalf of himself and the other legatees, to recover, as part of the assets, a large sum of money to which the testator was entitled under the ultimate trust in his marriage settlement.

The defendants were the three trustees of the marriage settlement, one of them being also the executor under the testator’s will. The other defendants were the other legatees under the testator’s will.

The testator, by his will, dated the 18th of September, 1843, after giving certain legacies, which were duly paid on the testator’s decease, gave certain legacies, payable twelve months after his wife’s decease; and as to all the residue of his monies and effects, he gave the same to his wife; and he appointed her and Mr. Holland and Mr. Edward Jodrell executors of his will; and he requested his executors to appropriate and set apart and invest on

Government or real security a sufficient sum of money out of his residuary personal estate to answer the several legacies which were made payable at the decease of his wife, and to pay to his wife, or permit her to have and receive, the annual proceeds of the sum so to be appropriated during her life. The will contained the usual direction, that his executors should be answerable for their own acts, receipts, and defaults only, and that they should not be responsible for each other, nor for any involuntary losses by the failure of securities, bankers, or otherwise in the execution of the trusts of his will.

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JODRELL.

The plaintiff became entitled, under one of the codicils to the testator's will, to the one-sixth share in a legacy of 800*l*.

The testator died in 1844, when the will and two codicils were proved by Mr. Edward Jodrell alone.

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By an indenture of settlement, dated the 18th of May, 1814, made on the marriage of the testator, Mr. Holland, with Mrs. Holland, then Miss Catherine Mary Lowndes, a policy of assurance, whereby a sum of 2,000*l*. was assured in the Equitable Assurance Office, to be paid on the death of Mr. Holland, was assigned to, and became vested in, certain trustees, of whom Mr. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone were the survivors, upon trust, after the decease of Mr. Holland, to receive the moneys payable upon the policy, and to stand possessed thereof, upon trust, to invest the same in their or his names or name in parliamentary securities, or at interest upon real security in England, and to vary the same, and to stand possessed of such securities, upon trust, in case Mrs. Holland should survive Mr. Holland, to pay the annual proceeds thereof to her for her life; and, after her decease, in case there should not be any issue of the marriage who should attain a vested interest (which event happened), the trust moneys were to be upon trust for the executors, administrators, or assigns of Mr. Holland.

Messrs. Gatty and Turner were the attorneys of the testator up to the time of his death; they were afterwards the attorneys of Mrs. Holland, and they also were the attorneys of the executor Mr. Edward Jodrell, as such, and of Messrs. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone, as the trustees of the settlement; and they appear to have had the entire confidence of all these persons.

In the month of March, 1845, the trustees gave a power of attorney to Messrs. Gatty and Turner, empowering them to receive the moneys

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which had become payable upon the policy upon the death of Mr. Holland; and they invested the amount which they received in the purchase, in the names of the trustees, of the sum of 4,810*l.*, 3*l.* per cent. *Consols. Messrs. Gatty and Turner, being authorised by a power of attorney, &c., received the dividends on the sum invested, and duly accounted for them to Mrs. Holland. In the month of June, 1846, the trustees gave Messrs. Gatty and Turner a power of attorney, authorising them to sell out the sum of 4,810*l.*, 3*l.* per cent. Consols. The sale realised the sum of 4,604*l.* 7*s.* 6*d.*

A mansion called Lawstock Hall, and other hereditaments were then vested in Messrs. Garth and Gatty in fee, subject to a prior mortgage upon the same hereditaments for 10,000*l.*, by way of second mortgage for securing the sum of 5,000*l.* The names of Messrs. Garth and Edward Gatty had been used in trust for Mr. William Gatty. This security was paid off by Messrs. Gatty and Turner by means of the 4,604*l.* 7*s.* 6*d.* trust fund, and of the sum of 395*l.* 12*s.* 6*d.* which was advanced by Mrs. Holland for the purpose of making up the principal sum of 5,000*l.*; but the security was continued in the names of Messrs. Garth and Gatty.

Mrs. Holland's income from the 5,000*l.* was paid by Mr. Edward Jodrell to her until her death, which happened on the 16th of February, 1848.

The property charged with the 5,000*l.* was barely sufficient to realise the first mortgage of 10,000*l.* secured thereon, and the 5,000*l.* was entirely lost. The trust fund having been thus lost, the three trustees proceeded against Messrs. Gatty and Turner by suit in equity to charge them with the amount; but that suit was ineffectual.

Under these circumstances, Mr. Sandford the plaintiff, on behalf of himself and all other the unsatisfied legatees under the will and codicils of Mr. Holland, filed this bill against Mr. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone, the three trustees of the settlement; and, after stating the above circumstances, prayed for an account of what was due to the plaintiff and to all other the unsatisfied legatees in respect of their legacies; *and if the defendants should admit that they had in their hands sufficient money to pay the same, then that the defendants should be decreed to pay the same accordingly; but if the defendants should not admit that they had in their hands

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sufficient for such purposes, then that an account might be taken of the moneys received by the trustees of the settlement in respect of the policy, and of their application thereof at the death of the testator's wife ; and that the defendants might be decreed to answer and make good to the testator's estate the amount thereof, with interest.

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The defendant, Mr. Edward Jodrell, the executor of the testator, and also one of the trustees of the settlement, had become of unsound mind, (though not found so by inquisition,) and he answered by his guardian.

Sir Richard Paul Jodrell and Mr. Stone submitted, by their answers, that the trusts of the indenture of settlement had virtually terminated on the death of Mr. Holland ; that Mr. Edward Jodrell, as the executor of Mr. Holland, with the concurrence of Mrs. Holland as tenant for life, was competent to receive the moneys payable on the policy, and that, in fact, he had taken on himself to receive and invest the money ; and that this defence was strengthened by the fact, that Mrs. Holland had advanced out of her own moneys an amount sufficient to make up the sum of 5,000*l*. They also stated, that Mrs. Holland had appointed Mr. Edward Jodrell her sole executor, who proved her will in 1848 ; and they submitted, that any concurrence by them in proceeding to realise the security and in suing Messrs. Gatty and Turner, was merely because, finding their names had been mixed up in the security without their knowledge, they were advised that they might aid in its recovery ; and they submitted, that they had been improperly made parties to the suit, and that the plaintiff was not entitled to any relief as against them ; and even if they were liable in respect of the policy comprised *in the indenture of settlement, they were liable to account for the same only at the suit of Mr. Edward Jodrell as the executor of Mr. Holland. Some other of the circumstances on which these defendants relied appear in the argument of their counsel.

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Mr. Craig and Mr. Nichols for the plaintiff.

Mr. Bacon and Mr. Goldsmid for the defendant Edward Jodrell.

Mr. Malins and Mr. Hardy for the defendant Sir Richard Paul Jodrell ; and

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Mr. Follett and Mr. Phillips for the defendant Mr. Stone :

If Mr. Edward Jodrell, who, as the executor of the cestui que trust, alone had a right to complain, had instituted this suit against his co-trustees for contribution, he must have failed. The things complained of were done at his suggestion and on his advice ; he, in fact, as executor, took, as he had a right to do, the management of the trust funds out of the hands of his co-trustees, and assumed the absolute control. He dealt with the trust funds as executor, and never alleged that he was acting as trustee until May, 1849, when the loss complained of had arisen. The suit against the solicitors, of *Jodrell v. Turner* was instituted at the instigation of Mr. Edward Jodrell, for his own protection, and with a view to involve his co-trustees in an admission of their liability ; that suit has substantially failed.

The present suit is instituted against the co-trustees of Mr. Edward Jodrell, at his suggestion, and for his indemnity, with a view to obtain, by circuitry, that relief which he could not have obtained in a suit instituted by himself against them.

* * * * *

[181] On the merits—the case is not sustainable against Sir Richard Paul Jodrell and Mr. Stone. The position of the trust funds and parties, and their rights on the death of Mr. Holland, were, that his executors, Mr. Edward Jodrell and Mrs. Holland, who was [*182] entitled to the income *for her life under the settlement and will, were together competent to demand and receive the entire fund from the trustees of the settlement.

Messrs. Gatty and Turner were, on Mr. Holland's death, retained by Mr. Edward Jodrell as executor, and by Mrs. Holland, she acting through him as her agent, as their solicitors. Everything now complained of was done by Messrs. Gatty and Turner, as solicitors for them alone ; the solicitors were not, for these purposes, retained or employed by Sir Richard Jodrell or by Mr. Stone.

The money received under the policy was, in fact, received for Mr. Edward Jodrell, with the approbation of Mrs. Holland, and it was invested in Consols under the direction of Mr. Edward Jodrell, as executor and as agent for Mrs. Holland. The investment was made in the names of the three trustees, without their knowledge until long afterwards.

The investment might just as well have been made in the names of any other persons—their powers and liabilities as trustees over

the fund had ceased when they executed the power of attorney to receive the amount payable on the policy, whereby they parted with the fund upon authority competent to authorise them in doing so.

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The re-investment in Consols in their names did not re-constitute them trustees under the settlement; and, from thenceforth, if they were trustees at all, it was for Mr. Edward Jodrell merely, and they became bound to deal with it according to his directions as executor.

But, assuming that the trustees were not discharged upon the execution of the power of attorney authorising the receipt of the money due on the policy, they, at all events, became so upon the execution of the power of attorney for the sale of the stock. From the transactions, it appears to have been intended to withdraw the funds for every purpose from the control of the trustees, and to deal with them as assets in the hands of Mr. Edward *Jodrell under the will, with Mrs. Holland's consent. The mixture and consolidation of her private moneys with the insurance moneys can only be accounted for on the assumption, that they were considered as the general assets of Mrs. Holland, subject only to the legacies given by the will of Mr. Holland, the testator.

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Neither Mr. Edward Jodrell nor the plaintiff, whom he, as executor, represented, and for whom he was acting, can be allowed to repudiate all that he, as executor, has done; and he and the plaintiff are bound by what took place before the loss was known. But, assuming the liability of the trustees, the security taken was a proper one at the time. It is not an improper security merely because it was a second mortgage: *Norris v. Wright* (1). No loss was sustained from the circumstance that the mortgage was not taken in the names of the trustees, nor from any defect of title; but it arose solely from the supposed deficiency of value, which is inferred from the sale effected in depressed times; but trustees are not liable for that.

These two defendants are entitled to inquiries as between them and Mr. Edward Jodrell, and then to ascertain whether the loss ought not wholly to fall on Mr. Edward Jodrell, or in what proportions between them; and, at all events, the estate of Mrs. Holland, who concurred, is not entitled to any relief. (They also cited *Trafford v. Boehm* (2).)

Mr. Craig was not called on for a reply.

SANDFORD THE VICE-CHANCELLOR :

^{v.}
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[*184]

As to the frame of the suit, it is said, that it is by a plaintiff, who, being a mere legatee, had no primary right to sue for the recovery of assets, and that nobody but the *executor could sue in such a case. But when I find that one of the individuals who committed that breach of trust was that very executor against whom the bill seeks relief for the breach of trust, it is enough to put an end to any objection as to the right of the legatees to file this bill.

The suit being properly framed, the only question remaining is, whether or not the lending the money on mortgage was a transaction by the trustees of the fund or by the executor of the testator. When it was proposed to lend the amount on mortgage, it was under the dominion of the trustees. It became assets only on the death of Mrs. Holland, in 1848. In 1846, it was vested in the names of trustees, subject to the trusts of the settlement then subsisting. During the lifetime of Mrs. Holland, application was made to the trustees, while it was thus subject to the trusts of the settlement, to have the moneys, then standing in their names in the 3l. per Cents., sold out and invested. Accordingly, it was sold out under a power of attorney, executed by the then trustees, and invested on mortgage; and the transaction was conducted, as the trustees were told it was to be conducted, by Messrs. Gatty and Turner, who, for the purpose of this transaction, were the solicitors and agents of the trustees. The money was sold out under that power in the lifetime of Mrs. Holland; it was laid out on a mortgage, which, notwithstanding the assurance of Mr. Gatty, upon which the trustees seemed to rely in the transaction, turned out insufficient; and, according to the rules in this Court, I am bound to hold, that it was a breach of trust on the part of the three trustees who concurred in the investment on that mortgage.

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But it is said, the real transaction was not that the money was sold out in order that it should be invested on mortgage; but, that the selling out was to put an end to the trusts of the settlement, and to hand over the money to the executor of Mr. Holland, under whose will Mrs. *Holland was tenant for life and Jodrell was executor. The only fact which seems materially to support this view of the case is, that Mrs. Holland concurred in the mortgage. But that is not enough to save the trustees of the settlement who sold out the fund and made the mortgage transaction

their own. As to some of the letters that passed, there has been a confusion between the character of Mr. Edward Jodrell, as executor, and as one of the trustees; but this is unimportant, for it is plain that Mr. Edward Jodrell was recognised by his co-trustees as acting in the character of trustee of the settlement in the mortgage transaction. If anything further were wanting to fasten the liability on the trustees, the averments in the bill filed by them, in 1850, would be enough. Therefore, I must declare that the three trustees are liable to make good to the estate of Holland, the testator, the whole of the money that was produced by the sale of the stock; and that they must account for it to the present plaintiff as assets of the testator.

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JODRELL.

JONES v. THOMAS.

(2 Sm. & G. 186—192; S. C. 22 L. T. O. S. 391.)

A judgment-creditor assigned the debt, and afterwards became insolvent. The judgment-debtor died, and her executor received notices from three claimants, one from the assignee of the debt, another from the assignee of the judgment-creditor in insolvency, and a third from the attorney of the judgment-creditor, in respect of his lien for costs; the executor thereupon filed his bill of interpleader: Held, that the bill could be sustained.

1854.
Jan. 28.
Feb. 9.

STUART,
V.-C.
[186]

THIS was an interpleader suit. The following are the circumstances under which it was filed:

Samuel Cannock brought an action of covenant against Elizabeth Jones, deceased, in the Court of Exchequer of Pleas at Westminster, and recovered final judgment therein, in 1848, for 60*l.* damages, and 18*l.* 3*s.* costs.

On error brought by Elizabeth Jones, in the Court of Exchequer Chamber, the judgment was in the month of June, 1850, affirmed, with 67*l.* 11*s.* costs.

Upon the appeal of Elizabeth Jones, the House of Lords, on the 5th of June, 1852, affirmed the judgment, with costs, to be certified by the clerk assistant, which were subsequently ascertained to amount to 217*l.* 1*s.* 6*d.*; but the certificate of the clerk assistant had not been obtained.

Elizabeth Jones died on the 15th of February, 1851; and Edward Jones, her executor, duly proved her will.

Mr. Evans, the attorney for Samuel Cannock, advanced sums of money to carry on the action, amounting to 100*l.* and upwards, and he was entitled to a sum of money for his costs; and he

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claimed a lien on the judgment for such sums of money and costs, and gave notice to Elizabeth Jones of his claim.

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By an indenture, dated the 1st of October, 1850, and made between Samuel Cannock of the one part, and James Abell of the other part, in consideration of the sum of 40*l.* to the said Samuel Cannock expressed to be paid by the said James Abell, the said Samuel Cannock assigned the above judgment obtained and registered against Elizabeth Jones, for the sum of 260*l.* 14*s.*, or other the sum or sums for which the judgment had been obtained and registered, and all interest which had become due or should thereafter *become due and payable thereon, unto the said James Abell, subject to the payment of such sum as might be lawfully due and payable to Mr. Evans as and for his costs in the action, after deducting certain money paid by the said Samuel Cannock on account thereof; and Samuel Cannock appointed James Abell his attorney, to sue out and prosecute execution upon the judgment or in the action.

Notice of this assignment was, shortly after its date, given to Elizabeth Jones.

Samuel Cannock became an insolvent debtor, and was discharged from custody in January, 1851, and his real and personal estate and effects became vested in the provisional assignee of the Insolvent Court; and on the 12th of February, 1851, William Thomas was appointed the assignee of the insolvent's estate and effects.

Mr. Thomas, the assignee in insolvency, on the 19th of February, 1853, gave Mr. Edwin Jones notice, alleging that the assignment to Abell was fraudulent, and claiming portions of the debt and costs.

Mr. Evans, in addition to his former notice, about the 22nd of February, 1853, served notices in writing on Edwin Jones, stating that he, as attorney for Samuel Cannock, had and claimed to have a charge or lien upon the damages and costs, and upon the judgments recovered by Samuel Cannock, or to which he should be entitled for his costs, charges, and expenses in or about the action.

Mr. Evans also gave notice that Mr. Abell had authorised him to receive such balance of the judgment and costs as might remain after satisfying his own lien, and he threatened proceedings for any injury to be occasioned by any delay in payment of the judgment debt or costs to himself, or to Mr. Abell.

Under these circumstances, Mr. Edwin Jones filed the present

bill against Mr. Thomas, Mr. Abell, and Mr. Evans; by which, after stating the above circumstances, he alleged *his readiness to pay the sums of money payable upon the judgment and for costs, and admitted assets of Elizabeth Jones come to his hands for the purpose; but he suggested that he did not know to whom the amount ought to be paid. By the bill it was prayed, that the defendants might be decreed to interplead, and that it might be ascertained to which of them the sums of 60*l.*, 139*l.* 3*s.*, 67*l.* 11*s.*, and 217*l.* 1*s.* 6*d.*, or other the sum which should be certified by the clerk assistant of Parliament, with interest, belonged; and asked leave to pay the amounts into Court, (which the plaintiff thereby offered to do,) for the benefit of such of the parties as might be entitled thereto; and for an injunction, restraining all the defendants from taking proceedings against him in respect of the debt and costs.

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v.
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The case now came on for argument upon the hearing, and was adjourned.

Jan. 28.

The case was again brought on this day.

Feb. 9.

Mr. Bailey, Mr. Dowdeswell, and Mr. Southgate, for the plaintiff. * * *

Mr. J. Gray, for the defendant Evans:

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This suit is altogether unnecessary. The plaintiff in equity might have safely paid the whole debt and costs to Mr. Evans, who, as the attorney in the action, could have given him an effectual discharge. No assignment of the debt could alter this right in the attorney.

The assignment to Abell was of a part only of the debt; the debt, therefore, upon the insolvency, passed entire to the defendant Thomas, between whom and Mr. Evans there is no conflict of claim.

Mr. Malins and Mr. Walford for the defendant Thomas:

* * If the plaintiff, instead of putting this bill on the file, had informed the defendants of his intention, no difficulty would have been placed in his way, and he might have safely paid the amount, either to Mr. Thomas, or to Mr. Evans, as the attorney.

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Mr. Hall, for the defendant (Abell), disclaimed all title; and

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said, that he never claimed any right directly against the plaintiff to have the amount of the plaintiff's debt paid to him.

THE VICE-CHANCELLOR :

The plaintiff seems justified by authority in filing this bill of interpleader. The case of — v. *Bolton* (1), decided by Sir WILLIAM GRANT, goes much further than the present case. The creditor in that case was entitled under a judgment to sue out execution against the plaintiff in equity, and the only other claimant was the creditor's own attorneys, who claimed a lien on the judgment for the costs.

[*192] That was a case in which, if in any case, the plaintiff in equity, who sought the protection by an interpleader suit, might have got from one of the claimants a good discharge of the legal title. The COURT, however, because there was the simple notice by the attorney of the judgment creditor, that he claimed a lien for his costs, entertained the bill and considered it a case for interpleader by the debtor on the judgment. The present case is one of much more complication, for there are here three distinct notices: one by *the attorney of the judgment creditor claiming a lien; secondly, a notice by the assignee of the judgment creditor in insolvency; and thirdly, by a person who claims under an actual assignment of the judgment. In this state of things, unless the case of — v. *Bolton* was wrongly decided, the debtor on the judgment is entitled to protection by bill of interpleader.

But what excited doubt in my mind was, the absence from the record of the judgment creditor himself; there being no *scire facias*, no person was brought before the Court as the defendant, who was competent to give the plaintiff a good discharge for the debt; and it was impossible, from the frame of the bill, to say, whether all the defendants, or one or which of them, could give a good discharge. But that doubt is removed by the circumstance of the death of the judgment debtor, which created a right of suit in certainly more than one of the present claimants who are defendants; and I accede to *Mr. Baily's* argument, that this is very much like the case of the obligor of a bond, and an obligee, who claims the debt after he has assigned it to a person who has given notice of the assignment to the obligor.

(1) 18 Ves. 292, where a judgment debtor received notice from the creditor's attorney of his lien for costs on the judgment. The debtor filed an inter-

pleader bill and the Judge referred it to the Master to ascertain what was due to the attorney. The report, which was *Ex Relazione*, occupies only a few lines.

ODDY *v.* SECKER.

(2 Sm. & G. 193—194.)

1854.
Feb. 22.

The liability of a defendant to account in equity for money received by him in the capacity of confidential agent is not altered by the fact that he has also been employed to act as solicitor for the same principal.

HOYES *v.* KINDERSLEY (1).

(2 Sm. & G. 195—198.)

1854.
Feb. 25.STUART,
V.-C.
[195]

The dividends of stock purchased during coverture in the name of the wife, out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a Bank to her account, and by her applied for domestic expenses. There was no evidence to show that the husband knew of the investment. The wife dying in the husband's lifetime, in a suit to administer the husband's estate: Held, that the presumption that the stock was a gift to the wife, arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends.

THIS was an exception to the report of Sir William Horne, whereby he certified, that the sum of 66*l.* 1*9s.* 6*d.* Bank Annuities, formed a part of the personal estate of Louisa Dott in the pleadings mentioned, whereas he ought to have certified that it was a part of the personal estate of the testator James Dott.

The bill was filed to administer the estate of the testator James Dott, who died on the 22nd of November, 1848. Mrs. Dott died on the 24th of July previously.

It appeared, from the evidence adduced before the Master, that, from the year 1828, the testator kept a banking account in London with Messrs. Masterman, and in Southampton with Messrs. Maddison. In that year, the testator, being of an advanced age, transferred to his wife the management of the Southampton account, and authorised her to draw cheques in her own name for the purpose of defraying the domestic expenses.

For some time the bankers at Southampton allowed Mrs. Dott to overdraw her account to a considerable amount, which was subsequently liquidated out of monies belonging to the testator in their hands. From 1830 the account was balanced half-yearly.

On the 21st of October, 1830, the bankers at Southampton, having in their hands the sum of 800*l.* 2*s.* 6*d.*, the property of the testator, it was invested in stock, in the name of Mrs. Dott; but there was no evidence to show the circumstances under which the purchase was made, further than that the purchase was made out

(1) *Lloyd v. Pughe* (1872) L. R. 8 Ch. 88, 42 L. J. Ch. 282; 28 L. T. 250.

HOYES
v.
KINDERSLEY. of the dividends placed by the testator under the management of the wife.

The dividends on the stock were paid to the banking account of Mrs. Dott, and were applied, with the other monies, in defraying the domestic expenses.

[196] It appeared, that, shortly after the opening of the account in Mrs. Dott's name, the drafts by Mr. Dott were comparatively few, and for small amounts. The cheques drawn by Mrs. Dott were, during the same period, for a considerable amount.

Mr. Malins and *Mr. MacNaghten*, in support of the Master's decision [cited *Dummer v. Pitcher* (1)] :

[197] The testator could not have purchased the stock in the wife's name to enable her to receive the dividends, because the Bank will not pay the dividends to a married woman without the consent of her husband. The only possible motive for the proceeding was to make a gift of the stock to the wife. (*'aton v. Rideout* (2) was also cited.)

Mr. Elmsley and *Mr. Piggott* appeared on the same side.

Mr. Craig and *Mr. Bageshawe* supported the exceptions.

THE VICE-CHANCELLOR :

I cannot agree with the Master in the conclusion to which he has come in this case. There is no doubt that this Court will support a gift by a husband to a wife during coverture for her separate use ; but, as stated by Lord ALVANLEY, and repeated by Sir THOMAS PLUMER in the case of *Walter v. Hodge* (3), there must be an unequivocal act by which the husband divests himself of the property and places it at the disposal of the wife. The transfer of stock into the name of the wife is *primâ facie* evidence of a gift to the wife, but it may be rebutted by evidence tending to show that no gift was intended. In *Lucas v. Lucas* (4), the COURT held, that there was strong presumptive evidence of an intention to give the South Sea stock to the wife ; and there being nothing to rebut it, the gift was supported by this Court.

But, in this case, the circumstances all negative the presumption that would otherwise arise from the fact, that the stock was purchased in the name of the wife.

(1) 39 R. R. 203 (2 My. & K. 262,
273).

(2) 84 R. R. 189 (1 Mac. & G. 599).

(3) 2 Swanst. 104.

(4) 1 Atk. 269.

In the first place, there is no evidence to show the *stock was ever purchased by the direction of the husband, who, at the date of the purchase, was of a great age, and had to a great extent abdicated his duties as the head of the establishment. In order to relieve him from the burden of these duties, cheques were drawn by the wife. It appears that two accounts were kept,—one by the wife and the other by the husband; and from a time anterior to the purchase of the stock, the drafts by the husband were small, while those of the wife amounted to 3,000*l*. No doubt the account on which the wife was authorised to claim, must have been replenished from the resources of the husband, but there is no evidence to show that this was done by the direction of the husband.

The manner in which the dividends were dealt with seems to me inconsistent with the notion, that the stock was at that time the separate estate of the wife. They appear to have been paid into that account, on which she had authority to draw, and applied, not for her separate use, but for the common expenses of the household. That circumstance rebuts the presumption arising from the purchase being made in the wife's name. I am of opinion, that the Master was wrong, and the exception must therefore be allowed.

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v.
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DAWSON *v.* JAY.

(2 Sm. & G. 199—206; S. C. 22 L. T. O. S. 345.)

The order of a foreign Court appointing a guardian of an infant, the child of a British subject, will be recognised in this Court with the respect due by the comity of nations to the order of a foreign Court, but it does not confer on the appointee the character of guardian in this country.

A QUESTION was raised on these petitions as to the custody of an infant, aged eleven years and four months.

The infant was the daughter of a British subject named Dawson, who, at the age of sixteen years, emigrated to America, where he engaged in commerce, and obtained letters of naturalization in that country. He subsequently married a lady named Jay, by whom he had three children, of whom one, the infant, survived him. In 1846 Mrs. Dawson died. At the date of her death, and for a considerable time previously, Miss Dawson, the sister of Mr. Dawson, resided with the infant, and continued to remain with her in Mr. Dawson's house until the death of that gentleman in 1852. On his death the infant became entitled absolutely in possession to real estate of

1854,
March 4.

STUART,
V.-C.
[199]

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DAWSON.

the value of 60,000 dollars, the property of her mother, which was situated in New York. After the death of Mr. Dawson an application was made to the surrogate of the city and county of New York by Mr. R. L. Dawson, a paternal uncle of the infant, that he might be appointed her guardian; but on this application being opposed by Mrs. Elizabeth Clarkson Jay (1), the infant's maternal aunt, an arrangement was made on the 2nd of June that Miss Dawson should be appointed guardian, upon an undertaking that the infant should be brought up as an American subject.

The undertaking (which it was said was required by the law of New York) was as follows:

"So long as I am guardian to Mary Jay Dawson, whether till she is fourteen or afterwards, if she elect me as her guardian at that age till she is twenty-one, I promise to bring her up in the United States, teaching her to consider it as her home, paying only an occasional visit to England.

"MARY ANN DAWSON."

[200]

While these proceedings were going on, and while the child was in New York, another uncle, Mr. F. Dawson, without Miss Dawson's knowledge, on his own application had been appointed guardian by the surrogate of Baltimore, in the State of Maryland. Upon this Miss Dawson wrote to Miss Jay repudiating the undertaking she had given, on the ground that she had no authority to enter into such an arrangement, and renouncing her character of guardian. The infant was subsequently brought back to the State of New York. Miss Jay immediately applied to the Supreme Court of New York for an injunction to restrain the removal of the infant from the jurisdiction of the Court of New York. The order for an injunction was granted; but when an attempt was made to serve it, the infant was clandestinely taken from Miss Dawson's abode through a back door, by a servant who was much attached to her; and in October, 1852, was brought by Miss Dawson to this country, where she had ever since remained with her paternal relatives.

On the 2nd of October, after the infant had left America, the appointment of Miss Dawson was revoked, and Miss Jay was appointed guardian by the surrogate of the city and State of New York.

Miss Jay subsequently came to England, and on her arrival

(1) Afterwards described in the report as Miss Jay.

presented her petition, praying that she might be appointed guardian to the infant.

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Dawson.

A cross petition was also presented by Archdeacon M'Donald, a relative *ex parte paternâ*, and the next friend of the infant in the suit of *Dawson v. Jay*, praying that a Mr. Pudsey Dawson, the infant's cousin, together with Miss Dawson, might be appointed guardians.

Mr. Wigram and Mr. Lawford for the guardian appointed by the surrogate of New York:

* * Not only was the infant an American by birth, but the whole of her property (which was in truth what gave Courts jurisdiction over infants) was immoveable property, situated in a foreign country, over which this Court had no sort of jurisdiction except by the comity of nations: *Burge*, 1006. To refuse to recognise the appointment of the American Court would be to ignore the only principle which gave the Court jurisdiction.

[201]

Mr. Bacon and Mr. Cairns for the paternal relatives [cited *Johnstone v. Beattie* (1)]:

It was settled in that case that the domicile is immaterial. The infant, though born in New York, must be taken to be a natural-born British subject; because, by the 18 Geo. III. c. 21, it was enacted, that all "persons born out of the ligeance of the Crown of England, whose fathers were entitled to the rights and privileges of natural-born subjects of the Crown of England, shall and may be adjudged and taken to be natural born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever." It could not be said that these privileges had been lost by the infant's father becoming naturalized in America, because it is clear that the privileges are the right of the children: *Fitch v. Webber* (2). The argument in favour of the validity of the appointment of guardian by the surrogate of New York could not be maintained, because, at the time the appointment was made, the infant was out of the district, within which, by the American law, the surrogate's jurisdiction must be exercised.

[202]

THE VICE-CHANCELLOR:

The first petition presented in this case on behalf of the infant sets forth the claim of Miss Eliza Jay, her maternal aunt, to the guardianship of the infant. This claim is supported on the ground

(1) 59 R. R. 23 (10 Cl. & Fin. 96).

(2) 77 R. R. 8 (6 Hare, 51).

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DAWSON.
[*203]

that the infant is by origin and domicile a citizen of the State of New York; that the greater part, *if not the whole, of the infant's fortune consists of property in the State of New York; that Miss Jay is the guardian appointed by the surrogate—that is, by the proper tribunal of that State; and that the infant was furtively, and by evasion of an injunction granted by the Supreme Court of New York, removed from America, and brought by her maternal aunt, Miss Mary Ann Dawson, to England, in October, 1852; that this was done in violation of a solemn promise in writing by Miss Mary Ann Dawson, that she would bring up the child in the United States, teaching her to consider that country as her home. Under these circumstances, Miss Jay asks this Court to appoint her guardian, with a view to the infant returning to the United States, and being brought up and educated there.

The order of the surrogate of New York, which appoints Miss Jay guardian, is to be recognised and treated in this Court with the respect due by the comity of nations to the order of a foreign Court. But it does not confer on Miss Jay the character of guardian in this country, and accordingly this petition, supported by Miss Jay, asks that this Court may appoint her guardian, or, if not, that some other fit and proper person may be appointed, and that all proper directions may be given concerning the infant.

The father of the infant was a British subject, and is said to have been, after many years' residence in America, naturalized as a citizen of the United States. Being born in allegiance to the Crown of England, this naturalization, though it conferred on him the rights of an American citizen, did not absolve him from his duties or deprive him of his rights as a British subject; and his child, born in America, of a marriage contracted with an American lady, and with an American domicile, and under the protection of American laws, is nevertheless a subject of the Crown of England.

[*204]

This child, thus connected with both countries, and with *her nearest relatives of equal degree in both, was, for the six years between the death of her mother in 1846, till after her father's death in 1852, living with her paternal aunt, Miss Dawson, an English lady, in New York, enjoying at the same time the society of her American maternal relatives, with perfect harmony among them all. All the maternal relations seem to have felt that Miss Dawson was the most proper person to be the guardian of the child.

The eagerness of Miss Jay to secure to the child an exclusively

Re
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American education has led to that state of things, which has, for a time, interrupted the previous harmony between the two classes of relatives. The spirit of nationality which actuated Miss Jay in resolving to have the child brought up in the United States as her home is natural and even laudable. But some regard was due to a similar spirit in the English relatives in favour of a home and education in England. It was somewhat too arbitrary a determination by herself in favour of her own views, which exacted that reluctant conditional promise, and excited those natural fears which induced Miss Dawson to abandon the guardianship rather than abide by the condition on which she held it, and drove the paternal relations to remove the child to this country in the manner complained of.

It is the duty of this Court to see that such an arrangement is made as to the guardianship, residence, and education of this child, as shall best tend to maintain her connection with both classes of relatives and both countries. But the proposal which has been made—that I should make such an order as would at once remove the child from the care of Miss Dawson, and deliver her to Miss Jay as her guardian, that she may immediately return with her to America, to be brought up as an American, and not as an English woman, seems conceived in a spirit rather exclusive and illiberal. To act upon it in *the way proposed would, I am perfectly satisfied, disturb the present happiness and comfort of the child.

[*205]

As to the argument here in favour of the right of Miss Jay as the guardian appointed in America, it cannot be maintained. Looking at it with all the respect due by the comity of nations to the order of an American Court, there seem to be some peculiarities as to the guardianship conferred by the surrogate of New York. His jurisdiction seems to be arranged on very restricted views. Although all the maternal relations of this child are citizens of the United States, none of them are regarded by the surrogate except the two aunts who reside in the city of New York. Two maternal uncles, one residing in the county of West Chester, in the State of New York, but beyond the limits of the city of New York, and another maternal uncle residing at Washington, in Virginia, are beyond the view of the surrogate. The paternal uncles and aunts being English, are treated one and all as foreigners. But even the nearest relations, with the highest rights of citizenship, unless residing within the county of New York, appear to have had no voice before the surrogate. This arrangement of the jurisdiction

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may be sufficient for the class of children whose nearest relatives live within the bounds of the city of New York, but can scarcely be suitable for those children of a higher class in society, whose relatives, most interested in their welfare, and most likely to promote it, may live beyond such narrow limits. For this reason the laws of America treat the powers of a guardian so appointed as strictly local. Mr. Kent, in his "Commentaries on American Law" (vol. ii. page 227), speaking with the authority due to more than twenty-five years of experience as a Judge in New York, says, that "a guardian appointed by the surrogate or by will is as much under the superintendence and control of the Court of Chancery, and of the power of removal by it, as if he were appointed by the Court." And, moreover, he says, that "the rights and power of the guardians over the person and property of their wards are strictly local, and cannot be exercised in other States."

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It seems, therefore, that the appointment of Miss Jay to be guardian by the surrogate of New York is so strictly local, that she could not, according to the American law, exercise it in the neighbouring State of Maryland, even if the case did not present the singularity of another guardian of the same infant appointed by the State of Maryland. Some degree of practical inconvenience and disturbance of comfort may be apprehended from orders pronounced by these conflicting jurisdictions; and it must be for the benefit of the child that a scheme should be so arranged as to secure to her the greatest advantages as to guardianship, residence, and education, that can be derived from her connection with both countries, and tend to the maintenance of a kindly and proper intercourse with her American as well as with her English relations. With these views, it seems to me, on a full consideration of the evidence in this case, and after having myself seen and conversed with the infant, as well as with Miss Jay, Miss Dawson, and other relations of the child, that it is fit and proper, and for her benefit, that Miss Jay should be associated in the guardianship with Miss Dawson and Mr. Pudsey Dawson; and that the usual and proper inquiries should be made before me, in chambers, as to the age and fortune and relations of the infant, with liberty to the guardians, or any of them, to propose a scheme for her residence, maintenance, and education.

[Further proceedings in the matter of this guardianship are reported in 3 D. M. & G. 764, and will be reproduced in 98 R. R.]

PATTISON *v.* GRAHAM.

(2 Sm. & G. 207—211.)

1854.
April 16STUART,
V.-C.
[20i]

The assignees of a residuary legatee and executor, who had become bankrupt, claimed from the testator's estate a sum of 350*l.*, and refused to concur in a sale unless paid that sum. In consequence of their refusal a bill was filed by the co-executor to administer the assets, and it appearing that nothing remained due in respect of the bankrupt's share, the COURT ordered the assignees to pay the costs of the suit.

Semble, where reasonable evidence of the state of accounts in which a bankrupt is interested, is tendered to his assignees, they are not entitled to insist on a judicial decision on their claims.

ANTONY PATTISON, the testator in the cause, by his will, dated the 22nd of August, 1844, gave and bequeathed his freehold and leasehold estates and other property to his son Peter Pattison and to his daughter, the plaintiff, Margaret Pattison, upon trust to pay the annual income thereof to his wife for her life, and after her death upon trust to convert the same into money, and to pay one legacy of 500*l.* to his daughter Mrs. Harding; and as to the residue, upon trust to divide the same equally between his son Peter Pattison and his daughter Margaret Pattison, whom he appointed his executor and executrix.

The testator died on the 29th of August, 1844, and his will was proved in the following December by the plaintiff, [Margaret Pattison, and] the said Peter Pattison, the latter of whom took the chief part in the management of the testator's property.

On the 12th of October, 1847, a *fiat* in bankruptcy was awarded against Peter Pattison; and R. C. Randal and W. Clay were appointed creditors' assignees; W. Turquand was appointed official assignee, and on his death was succeeded by the defendant G. S. Graham.

Subsequently to the bankruptcy, a part of the testator's property, with the concurrence of the assignees, was put up for sale by public auction, and knocked down to Mr. Harding, who was accordingly declared the highest bidder, for a sum of 2,070*l.*, and paid the deposit to the auctioneer.

Mr. Harding acted as the agent of a Mr. Fisher, who accepted the title; and a conveyance was accordingly prepared by the solicitor of the purchaser, which was approved by the plaintiff and Peter Pattison. When, however, the draft conveyance was tendered to the assignees for execution, those gentlemen refused to approve such draft or any draft conveyance of the property unless the plaintiff permitted them to receive out of the purchase moneys the sum of 350*l.* as the further share of the bankrupt. The

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assignees having persisted in their refusal, the plaintiff's solicitor, Mr. Walter, on the 27th of January, 1851, sent to Messrs. Mardon and Pritchard, the solicitors of the assignees, an account of the amount received by the bankrupt, the result of which was to leave a sum of 538*l.* 0*s.* 4*d.* due from him to the plaintiff. The purchaser having threatened to file a bill for specific performance, the plaintiff's solicitor addressed to the solicitors of the assignees the following letter, accompanied by a copy of the accounts, and a proposal that the assignees should receive a sum of 109*l.* 15*s.* 7*d.*, together with one moiety of the interest due on the purchase money.

"12, FURNIVAL'S INN, 16th of May, 1851.

"*Re Pattison*, 80, Cornhill.

"DEAR SIR,—Having recently received a communication from Mr. Greville relative to the investment or deposit of this purchase money in the hands of some third party, pending the discussion of the points on which we differ, I have carefully considered it in connexion with the difficulties which seem to arise in our coming to an agreement upon the points in difference; and in order to put an end to all controversy between us and to complete the purchase at once, I have advised Miss Pattison, without prejudice to her right to assert higher claims, to make such concessions as appear by the inclosed statement of accounts; and trust the assignees will see the propriety of completing the purchase on this basis without further delay. In making these concessions, however, Miss Pattison wishes it to be distinctly understood that she has gone as far as she possibly can; and if the assignees should refuse to complete the purchase and divide the monies according to the statement, and Miss Pattison should thus be driven to assert her rights, she will not consider herself precluded from enforcing her full claims. Yours truly,

"J. WALKER."

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In reply to the above letter, the assignees returned the following answer :

"*Re Pattison*.

"DEAR SIR,—We laid the proposition contained in your last letter to us before the assignees, and they, aided by the official assignee's and the accountant's opinion of what is really due to us, have instructed us to say that they are very desirous to effect an amicable arrangement, and to avoid any suit or controversy; and therefore they are willing to take for the matters in difference, in

lieu of their present claim on the purchase money and share of the other items in the account, the sum of 850*l.*; but if your client will not agree thereto, we purpose, on behalf of the assignees, to submit the following points to the Commissioner's decision, which are still questions in dispute between us:

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" 1. As to the debt of 850*l.*

" 2. The right of the mortgagee to charge commission.

" 3. As to the rent payable after the termination of the lease to Peter Pattison.

" 4. As to the property taken to pay taxes due by the estate to the trustee.

" 5. As to the further sums to be debited to Miss Pattison.

" 6. As to the right to tax the costs.

" Be so good as to inform us your client's determination to this offer; the assignees' costs to be paid out of the mortgage money.

" Yours truly,

" 24th of May, 1851.

" MARDON AND PRITCHARD."

On the 28th of the same month the plaintiff's solicitor sent a reply to the above letter, declining the proposed terms; and on the 8th of July the bill was filed.

On the 9th of February, 1853, the cause came on to the hearing, when the usual inquiries were directed. The accounts had been subsequently taken; from which it appeared *that the bankrupt had received the full amount of his share in the testator's estate, and that, consequently, nothing remained due to the assignees.

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The case was now brought on for further consideration, but the only question to be determined was, by whom the costs of the suit were to be paid.

Mr. Malins and *Mr. Busk*, for the plaintiff, contended that, upon the ordinary principle, the assignees were bound to pay the costs of the suit. By insisting on a demand which had turned out unfounded, they had made the suit necessary.

Mr. Bacon and *Mr. Eddis*, for the assignees:

The assignees were bound, on behalf of the creditors of the bankrupt, to insist upon an investigation of the accounts; and had they failed to have the accounts taken, and it had turned out that part of the bankrupt's assets had been thereby lost, they would be personally liable to make it good. Where any doubt existed of the accuracy of the accounts in which the bankrupt was interested, the

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GRAHAM. assignees were entitled to have a judicial decision on the amount due to the bankrupt's estate.

Mr. Faber appeared for the purchaser.

Mr. Bazalgette, Mr. Sheffield, and Mr. Nichols, for other parties, who took no part in the contest.

THE VICE-CHANCELLOR :

[*211] This is a very important question. The bill is filed to administer the estate of the testator, and it prays also that the sale may be completed, and the necessary accounts taken. The cause of the suit was a claim by the assignees of the bankrupt, who refused to concur in the sale to the purchaser, or to adjust the accounts upon *any other terms than that they should be paid a sum of 350*l.*, together with their costs.

The ordinary rule upon which this Court disposes of the costs is reasonably plain. If a suit is occasioned by a demand which the result proves to be unfounded, as a general rule the costs should be borne by the party whose unjust claim has led to the litigation. Unless, therefore, there is something in this case which exempts it from that general rule, the assignees, whose unfounded claim has led to this suit, must pay the costs.

It is contended, however, that the position of assignees is peculiar, and that, having regard to that position, the conduct of these gentlemen was only in accordance with their duty. The proposition is carried to the length of asserting that assignees, as a matter of right, are entitled to have a judicial decision on the state of the accounts between the bankrupt and the testator's estate. In my opinion that proposition cannot be sustained. The assignees of a bankrupt have no right to drive a person into this Court, except on the ordinary principle that the costs must be paid by the party by whose unfounded claim the litigation has been occasioned. I can recognise no special right in assignees that exempts them from what is the ordinary and the just rule on the subject of costs.

In this case it appears that satisfactory accounts were tendered to the assignees and repudiated by them. Moreover, the objection they raised in taking the accounts has rendered what might have been done in a few hours the work of years. I cannot help seeing also, that the effect of their conduct has been such that the plaintiff would have been the gainer if she had submitted to their demand,

unjust as it was. However, they insisted upon a judicial decision, and they have enjoyed it; and the result has been to show that they are entitled to nothing. But, in obtaining that decision the assignees have occasioned large costs, which have been still further increased by *the improper objections that have been raised. It would be contrary to every principle of justice to throw those costs upon the plaintiff. I have, therefore, no alternative but to direct that the whole costs of the suit shall be borne by the assignees, and that the costs of those parties which are commonly payable by the plaintiff shall be recovered by her from the assignees.

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HOBBS v. PARSONS.

(Sm. & G. 212—219; S. C. 2 W. R. 347; 23 L. T. O. S. 47.)

A testator directed the proceeds of his real estate to be invested in stock, upon trust, to pay the dividends to his two daughters, in equal shares, during their natural lives; and, "from and after their decease, to go to their respective children for their support and maintenance, until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age, in equal shares;" should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them: Held, that the children took vested interests.

The divesting clause was held to be void.

1854.
March 17.

STUART,
V.-C.
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JOHN PARSONS, by his will, having directed his just debts to be paid, made the following gifts :

"I give, devise, and bequeath unto my two sons, George Parsons and John Parsons, the sum of 3,000*l.* stock, in the New 3½ per Cents., which now stands placed in my name; Upon trust that they my said trustees, and the survivor of them, their executors, administrators, and assigns, shall receive and pay the interest and dividends thereof half-yearly unto Elizabeth my dear wife, for and during her natural life, if she should so long continue my widow, but no longer; and from and immediately after her decease or marriage, I give and bequeath the said sum of 3,000*l.*, and all interest due thereon, equally among my four children, George Parsons, Elizabeth Hobbs, Nancy Wilcox, and my son John Parsons, their executors, administrators, and assigns."

The testator then devised certain freehold and copyhold land to each of his sons, bequeathed his household furniture to his wife for her life, and, after her death, equally among his four children; he then gave his real estate at Warsash to his daughters, Elizabeth Hobbs and Nancy Wilcox, in equal shares, with a direction that the

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whole of it should be absolutely sold as soon as a fair price could be *obtained, by the full authority and direction of his said executors. The will then proceeded as follows :

“ I also direct the money from the produce from the sale of the said estates should be divided between my two daughters in equal shares ; I also direct the money of the produce of the sale of the estates shall be laid out and invested in the names of my executors as (1) ‘ the ’ my said trustees, in one of the Bank stocks in the Bank of England, whichever they may judge best, as also their respective parts or shares of the 3,000*l.*, which comes to each of them after the death of my dear wife, as also their proportion, parts, or share of the residue remainder, if any, which comes to my two daughters, Elizabeth Hobbs and Nancy Wilcox, shall also be invested in the same stock, in the names of my executors as (1) ‘ the ’ my said trustees or the survivor of them, they to receive half-yearly the dividends and interest thereof, apply and pay the same to Elizabeth Hobbs and Nancy Wilcox in equal shares, for during the natural lives of the said Elizabeth Hobbs and Nancy Wilcox respectively. And from and immediately after their decease, to go to their respective children for their support and maintenance, until they shall attain the age of twenty-two years severally, they to receive the principal and interest as ‘ the ’ attain such age in equal shares. Should either of them die before the attainment of twenty-two years, I direct the share or shares of either of them so dying before the attainment of such age, to be equally divided among the survivor or survivors of them.

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“ I also give and bequeath unto my daughter Elizabeth Hobbs the sum of 5,300*l.* 3½ stock, with all interest due thereon, which now stands placed in my name, for and during her natural life ; and from and immediately after her decease I give the said sum of 5,300*l.* stock, with all interest due thereon, among all her said children, or so many of them as may be then living at the time of her decease, in *equal shares. Should their mother die before each child should attain the age of twenty-two years, I direct the interest and dividends thereof should be applied for the support and maintenance of all the said children by the name of Hobbs, by my executors, until they severally attain the age of twenty-two years. In case of the death of either of the said children, I direct the share or shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them,

(1) *Sic* in original.

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the principal with all interest due thereon to be paid to each of them as they shall severally attain the age of twenty-two years by my executors as 'the' my said trustees or the survivors of them (1). I also give, devise, and bequeath unto my daughter Nancy Wilcox the sum of 5,300*l.* stock, with all interest due thereon, in the New $3\frac{1}{2}$ per Cents. which now stands placed in my name, for and during her natural life; and from and immediately after her decease, I give the said sum of 5,300*l.* with all interest due thereon unto and among all her said children, or to so many of them as may be living at the time of her decease, in equal 'shares,' my executors to apply, receive, and pay the interest and dividends thereof half-yearly, until they shall severally attain the age of twenty-two years, for the support and maintenance of all the said children. Should either one or more die before the attainment of twenty-two years, I also direct the share or shares of them so dying before the attainment of such age, to be equally divided among the survivors or survivor of them, the principal, with all interest due thereon, to be paid to them by my executors, as they shall severally attain the age of twenty-two years.

"And all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may consist, and not hereinbefore given, particularly devised, bequeathed, and disposed of, I do hereby give, devise, and *bequeath equally unto and between all my said children, the said George Parsons, Elizabeth Hobbs, Nancy Wilcox, and my son John Parsons, or so many of them as may be then living at the time of my decease, their heirs, executors, administrators, and assigns, subject to the payment of the aforesaid legacies and debts" (2).

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On the testator's death, the will was duly proved by his executors.

After the death of the testator's widow, the executors paid the dividends on the 3,000*l.* and 5,300*l.* to Mrs. Hobbs and Mrs. Nancy Wilcox; Mrs. Hobbs died in 1838, when her children claimed to have their shares of the said sums paid to them (those under twenty-two to be applied for their maintenance). The executors, in consequence of this demand, submitted a case to Mr. (now Lord Justice) Knight Bruce, for the purpose of taking his opinion, whether the gift to the children of Mrs. Hobbs was valid; Mr. Knight Bruce intimated that the question was not free from doubt

(1) The sentence is imperfect in the original.

(2) The above extract is given as the passage stands in the will.

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but that he thought the gift valid. A similar opinion was subsequently given by another gentleman at the Bar.

The executors acted on these opinions, and paid some of the legacies. In November, 1838, the bill was filed by Mr. and Mrs. Wilcox against the executors, and prayed that the will might be established and the accounts taken. The executors put in their answer, and submitted the question to the decision of the Court. In 1847, a decree was pronounced, directing the usual enquiries. In 1841, Mrs. Nancy Wilcox died during the progress of the suit, and the executors continued to apply the income of the shares of the children for their maintenance. The Master allowed these payments.

Exceptions were taken by the administrator of Mrs. Hobbs, and the administratrix of Mrs. Nancy Wilcox, that the Master ought not to have allowed such payments. The exceptions now came on for argument.

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Mr. Malins, for the executors, submitted to the Court, whether the bequest to the children of Mrs. Hobbs and Mrs. Nancy Wilcox was valid.

Mr. Elmsley and *Mr. Lewin* for the representative of Mrs. Hobbs :

* * There is no valid disposition, unless it is to be found in the direction, that the income is to go to the children for their support and maintenance. The question, therefore, resolves itself to this—do these words confer a vested interest in the principal? There is no one of the numerous authorities on this subject that goes this length.

(THE VICE-CHANCELLOR: I think you may assume, that, if the will contained no gift for maintenance, the gift would be void.)

[They cited *Leake v. Robinson* (1), *Batsford v. Kebbel* (2), *Vawdrey v. Geddes* (3), *Bull v. Pritchard* (4), *Boreham v. Bignall* (5), *The Marquis of Bute v. Harman* (6).]

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The plain meaning of the testator was to make an allowance to the children for their maintenance, and, in the event of their attaining twenty-two, to give them the principal, which was clearly

(1) 16 R. R. 168 (2 Mer. 387).

(2) 4 R. R. 15 (3 Ves. 363).

(3) 32 R. R. 196 (1 Russ. & My.
203).

(4) 25 R. R. 27 (1 Russ. 213—218).

(5) 85 R. R. 255 (8 Hare, 131).

(6) 73 R. R. 367 (9 Reav. 320).

a contingent gift: *Ring v. Hardwick* (1), *Comport v. Austen* (2), *Blagrove v. Hancock* (3).

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To hold that the gifts vested at the testator's death, would be to defeat the testator's intention; because, on attaining twenty—"one," if the gift were vested, each child might call upon the trustees to pay his legacy.

Mr. Temple and *Mr. Shebbeare*, for the representative of *Mrs. Wilcox*, cited *Southern v. Wollaston* (4).

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Mr. Bacon and *Mr. Shapter*, for the representative of the widow, cited *Bland v. Williams* (5).

Mr. Wigram and *Mr. Bagshawe*, jun., appeared for the executors.

Mr. Walker and *Mr. W. D. Lewis*, for the children, were not called on by his Honour.

THE VICE-CHANCELLOR :

There is considerable obscurity in the language of the will, but, upon the whole, I am of opinion that the payment to the children of the legacies, and not the vesting, was intended to be postponed. The will is the composition of an illiterate testator, and the spelling and the language are inaccurate. What he has given in the first place to his two daughters and their children, are shares of certain copyhold property, and shares in a sum of 3,000*l.* in his residuary estate; and in making this gift he says, that "my executors shall receive the dividends and interest thereof, apply and pay the same to my two daughters Elizabeth Hobbs and Nancy Wilcox, for their lives." It is evident he there intends to deal only with the shares, to the extent of his daughters' life estates. Having explained this, he proceeds to say what is to be done with the capital. His words are, "and from and after their decease, to go to their children." It is reasonably plain, the testator is here dealing with both principal and interest after the death of his daughters. It is said, indeed, that the testator means only the income; but I cannot see any ground for confining the direction to the income, which would naturally extend to both capital and income. I think the *subsequent direction makes the testator's meaning more clear; he says, "if any

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(1) 50 B. R. 202 (2 Beav. 352).

(2) 56 B. R. 52 (12 Sim. 218).

(3) 80 B. R. 91 (16 Sim. 371).

(4) 76 B. R. 78 (16 Beav. 166).

(5) 41 B. R. 93 (3 My. & K. 411).

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child shall die under the age of twenty-two, the share or shares of either of them shall be equally divided among the survivor or survivors." What share? Clearly not the share of the dividends, because no direction was necessary to effect that object. I think it is plain the testator was here speaking of the share of the principal, which he directed to go to the survivors. If there were more doubt of the meaning than appears to exist in this case, the Court would be bound to favour that construction which gives to the children, who are confessedly objects of the testator's bounty, a vested interest in the legacy. The divesting clause is void. The exceptions must, therefore, be overruled.

1854.
March 18.

STUART,
V.-C.
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BREWER v. SWIRLES.

(2 Sm. & G. 219—225 ; S. C. 23 L. J. Ch. 542 ; 18 Jur. 1069 ; 2 W. R. 339.)

A married woman, with an absolute power of appointment over property settled to her separate use, having, by her acts, induced the trustees to lend the fund on unauthorised security, so that it was lost, and conceiving herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost, in favour of her infant children, to enable them to file a bill to charge the trustees: the COURT dismissed the bill.

By an indenture of settlement, dated the 11th of July, 1840, between J. D. Brewer and Sophia his wife of the one part, and Walter Reid and William Waite of the other part, which was duly acknowledged by [Mrs. Brewer] under the Act, reciting that the wife under the will of one John Faulding was then entitled to one undivided fifth part of certain hereditaments directed by the will of the testator to be sold, subject to the life estate of the widow of the said testator, [the said share and interest in the said premises under the will of the said testator, subject to the said life estate, was conveyed to the use of the said Walter Reid and William Waite, their heirs and assigns, upon trust to sell the same and to invest the proceeds thereof in their or his names or name, either in or upon any of the trusts or funds of Great Britain, or upon real securities in England or Wales, and from time to time to vary the investments thereof as occasion should require or as should be thought proper, and to hold the same and the income thereof, upon trust for such persons as the said Sophia Brewer by any deed or instrument in writing, or by will, should, as well when covert as sole, appoint ; and in default of appointment, upon trust during the life of the said Sophia Brewer to pay the said income, when and as the same

should be received, to the said Sophia Brewer for her separate use, and after the decease of the said Sophia Brewer to hold the said trust funds] “in trust for the person or persons who, at the time of the decease of the said Sophia Brewer, should be of the blood and of kin to her, and also, either in his, her, or their own right, or in the right of his, her, or their representative, would have been entitled to the same under the statutes made for the distribution of the effects of intestates, in case the said Sophia Brewer had died intestate and without being under coverture.”

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The trustees, in pursuance of the trusts of the said indenture, sold the share for 600*l*.

Walter Reid principally acted in the trust, and had the control of the trust moneys.

Some time prior to 1846, Walter Reid, having contracted to purchase shares in certain ships, in order to complete the purchase applied to Mrs. Brewer for permission to invest the trust moneys in such shares, to which she assented (but no deed was executed in conformity with the settlement), and the fund was accordingly so applied. The *investment turned out unfortunate, and the trust fund was ultimately lost. Walter Reid made his will on the 9th of July, 1846, of which he appointed the defendants Swirles and Arnold executors.

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William Waite, the other trustee, had executed the various deeds, but being a seafaring man was frequently absent from England, and had never had possession of the trust moneys.

By a deed poll, dated the 22nd of December, 1851, duly executed under her hand and seal, Mrs. Brewer, in exercise of the power and authority given to her by the said indenture of the 11th of July, 1840, directed and appointed that the said trust moneys should be paid and transferred to Benjamin Motts and John Gardiner, upon trust to lay out and invest the same, and to stand possessed of such moneys, stocks, funds, and securities, upon trust for Eleanor Waite Brewer and Catherine Waite Brewer, and any children who might be born of the said Sophia Brewer by her then present or any future husband, in such shares or proportions as the said Sophia Brewer should by deed or will appoint.

On the 14th of January, 1852, Eleanor Waite Brewer and Catherine Waite Brewer, by their next friend James Moyse, filed the present bill against the surviving trustee and the executors of the deceased trustee, and prayed that an account might be taken of the proceeds of the said premises, and of the moneys which had

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been received by the said trustees or either of them, and that what might be found due might be paid by the executors of the deceased trustee and by the surviving trustee personally to the trustees of the said deed poll upon the trusts therein declared.

Mr. Bacon and Mr. J. V. Prior for the plaintiffs :

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It was clear that trustees could only deal with the trust fund in conformity with the powers contained in the settlement. In *Fowler v. Reynal* (1) the trustees took the security of *two out of three persons to whom the trust moneys had been lent, and it was held a misapplication of the fund for which they were liable.

Then could the concurrence of the married woman, in dealing illegally with the trust moneys, relieve the trustees from the consequence? It was submitted it could not. In this case, Mrs. Brewer received no benefit from the breach of trust, though even had she been a gainer by the transaction that would not exempt the trustees from liability either to Mrs. Brewer herself or her appointees: *Kellaway v. Johnson* (2). It was clear, on the authority of that case, that she could herself have maintained this bill.

The object of the settlement was to protect the wife against her own acts, influenced, as they must be, by her husband. Suppose the fund had been paid into her own hands, the trustees would be liable for a breach of trust. It was well settled that a married woman could not dispose of her property except in the mode recognised by the law, and the power of appointment did not extend her right except it was pursued strictly.

But whether Mrs. Brewer could herself maintain a suit against her trustees, it was clear that her appointees were not affected by her acts: *Kellaway v. Johnson* (2).

Here the plaintiffs, besides being appointees, would also come within the limitation in the settlement to the next of kin of the wife, and were entitled in that capacity to the relief sought by this bill: *Hopkins v. Myall* (3).

Mr. Batten appeared for the trustee Waite, and submitted, that the estate of the acting trustee was primarily liable to make good the loss occasioned by the breach of trust.

Mr. Elmsley and Mr. Cairns appeared for the other trustee, but were not called on by his Honour.

(1) 87 R. R. 163 (3 Mac. & G. 500).

(3) 34 R. R. 25 (2 Russ. & My. 86).

(2) 59 R. R. 511 (5 Beav. 319).

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In my opinion this suit is not maintainable. The bill is filed by the infant children of Mrs. Brewer as the appointees under a power contained in a post-nuptial settlement, by which certain property accruing to the husband in the right of his wife was settled for the exclusive use of the wife.

The whole scope of the settlement is to give the property for the exclusive benefit of the wife, and the recital is to that effect. There is, however, an absolute power reserved to Mrs. Brewer to appoint the property to any person she pleases, to her husband or to a stranger. No doubt there is a trust for her own separate use, but that is accompanied by the absolute power to which I have referred, by virtue of which she might give the property, in strict conformity with the settlement, to a mere stranger.

It is said, however, that she was under the disability of coverture. But so far as regards this property, she was in fact a *feme sole*, and must be so regarded by this Court.

Such being the nature of the settlement, Mrs. Brewer has so dealt with the property, that, in the event that has happened, it has been lost. It is true she has not followed strictly the method prescribed in the settlement (if she had, there could not be a pretence for this bill) ; but having absolute power to deal with the property she has availed herself of that right, though in an informal manner. I do not think, however, the mere informality would be sufficient to justify this Court in relieving her against her own act. I think, if this were a bill by Mrs. Brewer herself, complaining of her own acts, it could not be maintained. The disability of a married woman has never been extended so far in a court of equity.

Mrs. Brewer, being under the impression, which I think a right impression, that by her own conduct she could not maintain a suit to make the trustees liable, did not venture herself to become the plaintiff ; but, on the 24th *of December, 1851, shortly before the filing of the bill, she exercised the power of appointment contained in the settlement in favour of her infant children, the present plaintiffs, and by the terms of the deed she deals with the settled property as still existing, whereas at that time it had been lost by reason of an act authorised by herself.

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Under these circumstances, I am of opinion that Mrs. Brewer could not herself maintain the suit. I think the same disability attaches to her appointees ; and I shall therefore dismiss the bill, but, considering the peculiarity of the case, without costs.

DRYSDALE *v.* MACE.1854.
Feb. 10.

(2 Sm. & G. 225—230; S. C. 23 L. J. Ch. 518; 2 W. R. 341; aff. 5 D. M. & G. 103.)

[Affirmed on appeal. A note of the judgment of the VICE-CHANCELLOR here reported will be found in the report of the appeal to be reprinted in a later volume from 5 D. M. & G. 103.]

FARRAR *v.* BARRACLOUGH.1854.
Feb. 11.

(2 Sm. & G. 231—237; S. C. 2 W. R. 244.)

STUART,
V.-C.
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A widow, a tenant for life, desiring an increase of income, induced a trustee to invest, out of a trust fund, a sum exceeding two-thirds of its value on mortgage of copyhold house property at interest at 5*l.* per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one-fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income and its cause, they accepted a small sum of money in hand in lieu of their one-fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the remaining three-fourth parts of the fund, they sought by suit to charge the trustee with the deficiency: Held, that they had so far acquiesced in the investment, and could not complain of it.

It is not a breach of trust for a trustee to take a mortgage not containing a power of sale.

THE plaintiffs in this suit were Mr. Edward Farrar and Ann Eliza his wife, in right of the wife as sole residuary legatee of her father, a testator named Hebden. The defendant was Mr. William Barraclough, the trustee and executor under the testator's will.

The suit sought the administration of the testator's estate, and to charge the trustee with a sum of 600*l.*, which had been invested in a security unauthorised by the testator's will.

The testator Mr. Richard Hebden, by his will, dated the 12th of April, 1817, gave, devised, and bequeathed his real and personal estates unto the defendant Mr. W. Barraclough and another trustee long since deceased, upon trust to permit and suffer his wife Abigail to have the use and enjoyment thereof, to convert his stock in trade and all the residue of his personal estate into money, and to place out at interest on some good security or securities the whole of his personal estate (except the household goods and furniture), and from time to time to pay the interest arising therefrom, when and as the same should be received, together with the rents and profits of all his real estates unto his wife during her natural life, for her own support and the maintenance and education of his daughter Ann Eliza, in case she should so long remain unmarried, but not otherwise. And the testator declared, that, in

case his daughter should happen to get married during the life of his wife, it was his will and mind, and he thereby directed, that his trustees should thenceforth pay unto his wife, during so long time as she should remain unmarried, the *rents, interests, and produce of three-fourth parts only of his real and personal estates ; and if his daughter should happen to get married during the life of his wife, then he declared that his trustees should, at the expiration of six months from the time of such event, by and out of his personal estate, pay unto his said daughter such sum of money as would be equal in value to one-fourth part of his real and personal estates ; and when and so soon as his wife should happen to die or marry again, then he directed that his trustees should convey the whole of his real estates, and assign or pay such part of his personal estate as should not have been previously disposed of, unto his daughter for her own use absolutely, if she should then be living, with other limitations over in certain events which have not happened.

The testator died in May, 1817, and the defendant Mr. Barraclough and his co-trustee, who were also the executors, proved the will in the proper Ecclesiastical Court.

The co-trustee died many years ago, having first duly accounted to Mr. Barraclough in respect of the testator's estate.

The plaintiff Mr. Edward Farrar married the testator's daughter on the 14th of September, 1838.

The testator's widow did not marry again, and died in the month of November, 1849.

Mr. Barraclough in the month of November, 1829, lent 600*l.*, part of the testator's personal estate, to one Henry Sutcliffe, upon the security of ten copyhold cottages held of the manor of Wakefield, which were surrendered to the defendant by way of mortgage, but without any power of sale. The 600*l.* remained due on the security, together with considerable arrears of interest thereon.

Mr. and Mrs. Farrar filed their bill against Mr. Barraclough, stating the above facts and circumstances ; charging, that the security on which the 600*l.* had been invested was very inadequate, and that the rents of the ten cottages *had for some time past been insufficient to keep down the interest of the principal sum ; and praying for the usual accounts of the real and personal estate of the testator possessed by the defendant ; and that the residue might be paid and assured to the plaintiffs ; and that the defendant might, if necessary, be decreed to make good the 600*l.* and interest at 4*l.*

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per cent. per annum, or so much thereof as the security should be insufficient to satisfy.

It appeared in evidence that the money had been advanced in 1829, at the request of the testator's widow, who proposed the security to the defendant; and that the defendant was in part induced to lend the amount, in order to obtain the high rate of interest of 5*l.* per cent. for the testator's widow, whose income was small. The property consisted of ten cottages, occupied by weavers, at a gross annual rental of 47*l.*, and their value was estimated at 890*l.* The work of the weavers had been superseded by the introduction of steam power, and the value of the property had consequently deteriorated; the mortgagor had become unable to pay the interest, and about ten years since the property had been unsuccessfully offered for sale by him; after that time it had been in the defendant's possession, but the rents were very inadequate to keep down the interest.

On the marriage of the plaintiffs the defendant paid to the plaintiff Farrar 99*l.* 14*s.*, a sum then in hand, in lieu of the one-fourth share of the testator's estate given to Mrs. Farrar on her marriage by the testator; and thereupon Mr. and Mrs. Farrar gave a receipt as in part of money due under the will. The defendant alleged by his answer, and by his own deposition in support of his case, that on that occasion he informed Mr. Farrar of the mortgage, and that the interest was in arrear, as a reason why he should not insist on receiving the full one-fourth of the property to which, by the terms of the will, Mrs. Farrar had become entitled on her marriage. The plaintiff, however, *deposed, that, since the marriage, and since he had become acquainted with the nature of the security, he had expressed his entire dissatisfaction with it; and that he had neither adopted nor acquiesced in it.

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It was in evidence in the case, that, after the death of Mrs. Hebden, the widow, the plaintiff Mr. Farrar had been willing to accept a transfer of the property, on the mortgagor concurring and releasing the equity of redemption; but that the transfer was not completed in consequence of the death of the mortgagor.

Subsequently the plaintiffs required the trustee to make good the deficiency on the security.

Mr. Malins and Mr. J. T. Humphry for the plaintiffs:

The investment, at the time it was made, was improvident. [They cited *Stickney v. Sewell* (1).] The kind of property, small

cottages, was not suitable for an investment of trust funds. Acquiescence by the plaintiffs since the marriage is suggested as a defence; that is entirely denied, and it does not appear that the plaintiffs knew of the nature or character of the security, so as to bind the plaintiffs by any acquiescence.

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CLOUGH.

Mr. Bacon and *Mr. G. L. Russell*, for the defendant, submitted that the value was adequate when the advance was made; that a surplus of 290*l.* afforded reasonable margin *enough to entitle the trustee to say the security was sufficient; that the trustee had not relied on the precise value, but had been advised by a competent surveyor that the security was sufficient, and that he was absolved from responsibility.

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They also contended that the conduct of *Mr. and Mrs. Farrar*, acquiescing during the life of *Mrs. Hebden*, deprived the trustee of the remedy he would have had to impound her income to make good any deficiency in the proceeds of the security, and was an acquiescence which destroyed any equity which the plaintiffs might otherwise have had.

Mr. Malins, in reply.

THE VICE-CHANCELLOR said :

The rule of this Court, which regulates the conduct of trustees in the investment of trust funds, is of very great importance. Lord COTTENHAM has stated it very clearly in *Stickney v. Sewell* (1), where he says, " To advance two-thirds is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating " (2). In ordinary cases of investment by trustees, where the value of freehold property is estimated at less than two-thirds of the money lent, the investment is, according to the rule of this Court, improvident. On the other hand, the conduct on the part of those who are interested in the investment may be such as to preclude their right to complain of the conduct of the trustees, if the security should turn out insufficient. Thus, if a tenant for life is aware that the money advanced upon *property is more than two-thirds of its value, in order that 5*l.* per cent. for the money might be received, the cestui que trusts in remainder, also acquiescing, are not entitled to complain of the conduct of the trustees.

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(1) 43 B. R. 129 (1 My. & Cr. 8, 15). (2) See now the Trustee Act, 1893, s. 8.

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In this case, the widow, the tenant for life, wished to get a larger income for herself, and the interest upon this security was 5*l.* per cent. The investment was made in 1829 with her concurrence, and the money has since that time continued on the same security, without any request ever having been made on the part of any person interested that it should be called in.

The plaintiff, Mr. Farrar, in right of his wife, became, on his marriage in 1839, entitled to one-fourth part of the trust fund; and on that occasion the trustees explained to him the nature of the investment, and that it had been made in order to secure 5*l.* per cent.

In 1849 the widow, the tenant for life, died, and the property thereupon accrued in possession. The plaintiffs were aware of this investment, and that the property had become depreciated in value; and yet it appears that even then the plaintiff, Mr. Farrar, was willing, upon obtaining a release of the equity of redemption, to take the property in satisfaction of his claim. That arrangement was intercepted only by the death of the owner of the equity of redemption.

I must, under these circumstances, hold that the plaintiffs had full knowledge of this investment, and that the security had been taken in order to procure for the tenant for life the largest interest possible.

The bill does not allege that the property was of insufficient value in 1829, but it states that the rents of the cottages upon which the money was advanced have not kept down the interest. The plaintiffs do not say that that fact came upon them by surprise, and there is nothing else to charge the defendant with breach of trust.

[237] An attempt has also been made to charge, as a breach of trust, that the defendant took the mortgage without having had given to him a power of sale; but I never heard that that amounted to a breach of trust. If such a breach of trust be the sole object of this suit it is not sustainable on that ground.

1854.
March 8.

MARSHALL v. BREMNER.

(2 Sm. & G. 237—240.)

A testator desired his executors to sell, as they might think proper, his business and lease of his house; and to place the money in the funds; and to pay to his wife all rents, dividends, or funded property, and all other rents or interest to which he was entitled, for her use, and for bringing up

all his children; and, at her death, all the residue of his estate to be equally divided among his children. The executors were authorised to advance to any child his portion, at his wife's approbation, but not to decrease her income below 100*l.* per annum: Held, that there was no trust for conversion.

MARSHALL
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The question against the widow was raised by claim, which involved a litigation extending over four years; the same question might have been raised by bill and demurrer. The COURT, holding the costs to have been improperly incurred, refused the plaintiff his costs.

JOHN BREMNER, by his will, dated the 15th of July, 1828, after appointing executors, desired them to sell or dispose, as they might think proper, of his business and lease of the house in Piccadilly, and, if sold, to place the money in the funds, together with all debts due to him as soon as collected, for the benefit of his wife and children; and he desired his executors to pay to her, as often as they became due, all rents, dividends, or funded property, and all other rents or interest to which he was entitled or might become entitled, for her use, and for educating, supplying, and bringing up all his children, which he then had or might have by her; and at her death all the residue and remainder of his estate to be equally divided among his surviving children that had attained the age of twenty-one *years, or his daughters on their marriage, the others to receive their shares as they respectively arrive at that age of twenty-one years; and if it should appear to his executors that it would benefit any of his children to advance the portion they would be entitled to at their mother's decease, and it should meet her approbation, he desired them to do so, but on no account to reduce her income below 100*l.* per annum if unmarried; and in case his wife should again marry, he desired his executors to pay to her the whole of the above-named rents, dividends, and interests, as long as they were satisfied that his children were properly provided for and taken care of; and if they were not, he desired his executors to provide for them out of his estate, and to retain a sum of money to pay to his wife personally, notwithstanding her coverture, the sum of 40*l.* per annum, the principal to be equally divided among his surviving children at her death, with the rest of his property; and he desired his executors to divide in manner as before directed in case of the death of his wife, that is, on their respectively arriving at the age of twenty-one years, or daughters on their marriage.

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On the testator's death, the executors having disclaimed probate, administration with the will annexed was granted to the testator's widow.

MARSHALL
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BREMNER.

The principal part of the testator's estate consisted of leasehold houses held for short terms of years. One of these leasehold houses was the house in Piccadilly, held for a term of which only fifteen years remained. The administratrix carried on her husband's business therein for her own benefit. There were other leasehold premises unsold of which the administratrix received the rents. All these leaseholds were rapidly decreasing in value.

There were ten children, and the widow maintained and educated them all until each attained majority.

[*239] Mr. John Bremner, one of these children, having become an insolvent debtor, Mr. Marshall, the creditor's assignee, and Mr. Sturgis, the provisional assignee under his *insolvency, obtained from the widow as the administratrix with the will of the testator annexed, by proceedings against her in the Insolvent Court, an account of the assets. They then filed this claim against her and all parties interested under the will, stating that William Bremner was one of the residuary legatees under his father's will and codicil, and claiming the administration of the estate under the decree of the Court.

The claim came on to be heard before the Vice-Chancellor Knight Bruce in January, 1851, when the cause stood over to enable the administratrix to render an account to the plaintiffs. The account was rendered accordingly; but the plaintiffs, not being satisfied, proceeded with the suit, and on the 28th of May, 1851, the Court made a decree directing the usual inquiries and accounts to be made and taken. The Master having made his report the cause now came on for further directions.

Mr. Cox, for the plaintiffs, submitted that, under the terms of the testator's will, the immediate sale and conversion of all the testator's assets, including his trade, were directed; and that the widow had no right to the enjoyment of the assets in specie; and that the accounts must be taken against her upon that footing. This is the rule as laid down in *Howe v. Lord Dartmouth* (1). He also cited *Prendergast v. Prendergast* (2), distinguishing the present case from that.

Mr. Baily and *Mr. Elderton*, for the administratrix, said, the testator did not direct a conversion; but the whole scheme of the will rather contemplated the enjoyment of the assets in specie.

(1) 6 B. R. 96 (7 Ves. 137).

(2) 71 B. R. 67, see p. 73 (3 H. L. C. 195).

The will vested a discretion in the trustees to continue the assets in the investments in which they found them; and where that discretion was not exercised, the Court would not exercise the discretion by converting them; and on this point they relied on *Prendergast v. Prendergast* (1).

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Mr. Amphlett appeared for the children.

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THE VICE-CHANCELLOR :

I have no doubt as to the question of conversion raised in this case. By this will the testator has expressed his intention that the widow should enjoy the income of his property in specie. He directs his executors to pay to his widow as often as they become due all "rents;" and he meant this for a very laudable purpose, that, during her life, she should have the means of bringing up all the children. He says, subsequently, that her income is not to be reduced below 100*l.* a year, even with her consent. On the construction of the whole of this will I am of opinion that the testator intended that there should be no conversion.

The rule applicable to this case will be found in *Lord v. Godfrey* (2), where the principle is very succinctly laid down, as most propositions by Sir JOHN LEACH are stated. That is a precedent to be followed in the present case.

In this case, the plaintiffs, being assignees of an insolvent, took proceedings in the Insolvent Court; and if the matter had rested there it would have been better for all parties. The plaintiffs were entitled to raise the question in this Court: there might have been a bill, and upon a demurrer the question might have been decided; but the plaintiffs have filed a claim upon which it could not be decided except upon the cause being brought to a hearing. After four years of litigation the question comes before me upon the Master's report; and now there is no case made for the suit. The plaintiffs ought not to be allowed to saddle those who have the conduct of the matter with the costs of this expensive proceeding.

Declare, that there is no trust for conversion. The plaintiffs to pay their own costs, those of the defendants to be paid out of the estate, all further proceedings to be stayed.

(1) 71 R. R. 67, see p. 73 (3 H. L. C. 195).

(2) 4 Madd. 455—459, where a testator who held Long Annuities directed his trustees to pay the interest and dividends of the stocks and funds

standing in his name on the books of the Bank of England to his wife during her life: Held that this was a gift to her of an express life interest in the Long Annuities.—O. A. S.

1854.
March 8.

CRADOCK *v.* OWEN (1).

(2 Sm. & G. 241—248.)

STUART,
V.-C.
[241]

A testatrix, by will in 1841, gave to two devisees, who were also her executors, all her real and personal estate, upon trust for sale, and she gave out of the produce of her real and personal estate 50*l.* to each executor for his trouble, and other pecuniary legacies. There was no gift of the residue; and, after payment of debts and legacies, a surplus remained. The testatrix left no heir-at-law or next of kin.

The COURT apportioned the legacies and costs of the suit between the proceeds of the real and personal estate, and the Crown was declared to be entitled to the surplus of the personal estate.

MISS JANE WAKELIN COURTNEY, by her will, dated the 12th of February, 1841, appointed the plaintiff, Mr. Henry Cradock, and the defendant, Mr. Thomas Ellis Owen, her executors; and, after giving a small pecuniary legacy of 19*l.* 19*s.* to a charity, she gave, devised, and bequeathed unto the said Henry Cradock and Thomas Ellis Owen, their heirs, executors, and administrators, all her real and personal estate, upon trust to convert the whole into money. The testatrix then proceeded as follows: "And I direct that Mr. Henry Cradock and Mr. Thomas Ellis Owen shall each retain out of the produce of my real and personal estate the sum of 50*l.* for his trouble in the execution of this my will and the trusts thereof, and I give and dispose of the residue of the produce of my real and personal estate as follows:" Certain legacies to legatees by name were here enumerated, to the amount of 900*l.* The testatrix made no other disposition of her real or personal estate.

The testatrix died in August, 1847.

Mr. Cradock, on the 9th of July, 1851, filed his claim against Mr. Owen; and after referring to the trusts and disposition of the will, and stating that the real and personal estate of the testatrix had been sold and converted into money, and that all the legacies given by her will had been paid, and that the executors were willing to account for the proceeds of the estate and to have the estate administered; but that they were unable to discover who was the heir-at-law *or next of kin of the testatrix, or who were interested in the real and personal estate of the testatrix. The plaintiff claimed to have the estate administered in Court, in the presence of Mr. Owen the defendant, and such other persons as the Court should direct.

(1) Under the Intestates' Estates Act, 1884, all real estate which would have devolved upon the heir of a deceased person if he had died intestate

now escheats to the Crown in default of any heir unless it is effectually disposed of by the will of the deceased.—O. A. S.

By the decree made at the hearing in July, 1851, the Court referred it to the Master to inquire who was heir-at-law, and who were the next of kin of the testatrix, and in their presence to take the usual accounts of the testatrix's real and personal estate. In pursuance of leave given to them by the decree the executors paid into Court to the credit of the cause 356*l.* 15*s.* 6*d.* to "the account of the personal estate," and 245*l.* 10*s.* 6*d.* to "the real estate account."

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The Master by his report found that no person had come in before him to prove or claim as heir-at-law or next of kin, and stated that therefore he did not take the accounts.

By an order made on further directions, dated the 26th of January, 1853, the cause was referred to chambers for the usual inquiries as to whether the testatrix left any heir-at-law or next of kin living at her death; and it was ordered that notice of such inquiries should be given to her Majesty's *Attorney-General*.

The *Attorney-General* attended the inquiries before the chief clerk at chambers, who certified that he did not find that there was any heir-at-law or any next of kin of the testatrix living at her death.

The cause having come on upon this certificate for further consideration on the 30th of June, 1853, in the absence of the *Attorney-General*, the usual accounts of the real and personal estate of the testatrix were directed to be taken in the presence of the *Attorney-General*; and among other things, it was ordered that the testatrix's personal estate not specifically bequeathed should be applied *in payment of her debts and funeral expenses in a due course of administration, and then in payment of her legacies; and further inquiries were directed to be made.

[*243]

The chief clerk, by his certificate dated the 19th of December, 1853, certified that he had taken the accounts and made the inquiries in the presence of the *Attorney-General*, and that "all the pecuniary legacies given by the testatrix's will, which were payable at her death, had been paid and had been allowed in the said account of personal estate."

The cause now came on again upon the certificate of the chief clerk for further consideration.

The only questions raised were, first, whether the Crown was entitled to the residue of the personal estate; and secondly, it being admitted that the Crown was not entitled to the real estate devised or its proceeds, whether, notwithstanding the direction

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in the order on further consideration of the 30th of June, 1853, for the payment of the debts and legacies out of the personal estate, made at a hearing at which the *Attorney-General* did not appear, the Court should now direct that the debts and legacies (other than the small legacy of 19*l.* 19*s.* to the charity, which had been paid out of and charged exclusively to the personal estate,) should be apportioned rateably between the real and personal estates in augmentation of the residuary personal estate.

Mr. Selwyn for the plaintiff :

The devisees and executors are entitled to the proceeds of the real estate, subject to the question of apportionment of the debts, legacies, and costs of suit: this is conceded.

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They are also entitled to the whole proceeds of the personal estate undisposed of by the will, to the exclusion of the Crown. Prior to the 11 Geo. IV. & 1 Will. IV. c. 40, *the executors would have been entitled to retain it even against the next of kin; but that statute constituted the executors trustees of the undisposed of residue for the next of kin of the testator. That statute was, however, confined to the next of kin, and did not alter the rights of the executors as against the Crown in case of undisposed of residue of a testator who left no next of kin. Thus, it was held, even in the case of an administrator to a person who died without leaving any next of kin, that the Crown had no title against the administrator: *Hawkins v. Hawkins* (1).

But if the Court should hold that the Crown is entitled to the residuary personal estate undisposed of by the will, it ought exclusively to pay the debts and legacies, and the costs of suit. Thus, in *Boughton v. James* (2), where a mixed fund was created out of the proceeds of real and personal estate, it was held that the personal estate was the primary fund to pay legacies and annuities, on the ground that there was no direction to discharge the personal estate from its ordinary primary obligation. The same reason exists here, and, therefore, the same rule should apply. Moreover, the right of the Crown to any apportionment in aid of the personal estate of the charges on the proceeds of the real and personal estate, was concluded by the decree which directed the legacies to be paid out of the personal estate, and the certificate of the chief clerk that they had been paid thereout accordingly, and that such payments had been allowed to the executors in their accounts.

(1) 40 R. R. 92 (7 Sim. 173).

(2) 73 R. R. 116 (1 H. L. C. 406).

Mr. Cox, for the defendant *Owen* in the same interest.

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Mr. Wickens, for the *Attorney-General*:

It is conceded *that the Crown is not entitled to the proceeds of the real estate after it has been charged with its due proportion of the debts, legacies, and costs: *Burgess v. Wheate* (1), and other cases, including *Taylor v. Haygarth* (2). But, on the authority of this last case, the Crown is entitled to the personalty. This also appears from *Middleton v. Spicer* (3), where Lord THURLOW says, "The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown as they would have been for any of the next of kin, if these could have been discovered." *Taylor v. Haygarth* was followed in *Elcock v. Mapp* (4).

[*245]

But the gift of the 50*l.* to each executor for his pains and trouble effectually excluded the presumption that they were to take anything more under the will. It follows that the Crown is entitled.

The Crown is entitled to have the legacies (except the legacy of 19*l.* 19*s.*) paid rateably out of the proceeds of the real estate, to the surplus of which the executors as devisees are entitled, in exoneration to that extent of the residuary personal estate.

The will gave all the real and personal estate upon trust to sell and convert the whole into money; and the money thus arising was formed into a mixed fund, out of which the legacies, except that of 19*l.* 19*s.*, which was payable out of the personalty, were directed to be paid. The legacies and the costs of the suit should, therefore, be apportioned between the proceeds of the real and personal property: *Roberts v. Walker* (5), which is a leading case on this point. *Boughton v. James* (6) does not apply to the present case, for in that case there was no trust to sell the real estate and convert it.

The direction given by the Court to pay the debts and legacies out of the personal estate, and the subsequent certificate of the chief clerk that he had allowed such payments to the executors accordingly, cannot be binding on the Crown, since the *Attorney-General* was not present when the order was made, and he appears in Court to-day for the first time.

[246]

(1) 1 Eden, 189.

(2) 65 B. R. 530 (14 Sim. 8).

(3) 1 Br. C. C. 201.

(4) 88 B. R. 174 (3 H. L. C. 492).

(5) 32 B. R. 318 (1 Russ. & My. 752).

(6) 73 B. R. 116 (1 H. L. C. 406).

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Mr. Cox (in the absence of *Mr. Selwyn*) replied :

He submitted that the certificate of the chief clerk, having been filed eight days without any application made to vary or discharge it, was conclusive on the Crown under the 15 & 16 Vict. c. 80, s. 34, and the 51st of the Orders of the 16th of October, 1852.

THE VICE-CHANCELLOR :

The first question is, as to the right of the Crown to the surplus of the personal estate. That right is perfectly clear, if, by the terms of the will, the executors are excluded. There is a gift to the executors for their care and pains in their office. That excludes their right to the personal estate, even independently of the statute of 11 Geo. IV. & 1 Will. IV. c. 40. By the settled doctrines of the Court, ever since the case of *Middleton v. Spicer* (1), the executors being excluded, and there being no next of kin, the personal estate goes to the Crown.

The next question is, as to the payment of the legacies. What I have to consider is, whether, according to the terms of this will, the legacies are, in the ordinary course of administration, payable primarily out of the personal estate, or out of the mixed fund. This will contains a direction that the whole real and personal property shall *be converted and constitute a mixed fund; and the testatrix directs all the legacies, with the exception of the legacy of 19*l.* 19*s.* to be paid out of the proceeds of her real and personal estate, that is, out of this mixed fund. This case is entirely within the principle of *Roberts v. Walker* (2), and my decision must proceed on the principle of giving a rational interpretation to the whole will. If a testator says, that legacies are to be paid out of the proceeds of real and personal estate, a right of apportionment between the proceeds of the real estate and the proceeds of the personal estate, according to their respective values, is given. The legacies must therefore be apportioned. This case is in no degree governed by *Boughton v. James* (3).

But, it is said, that this matter is *res judicata*, and no longer open to discussion, because, by my order, of the 30th of June, 1853, made on further consideration of the cause on the certificate of my chief clerk, the executors are directed to pay the legacies out of the personal estate; and my chief clerk has certified that they have been paid, and that he has allowed such payments to the

(1) 1 Br. C. C. 301.

(3) 73 R. R. 116 (1 H. L. C. 406).

(2) 32 R. R. 318 (1 Russ. & My. 752).

executors in their accounts of the personal estate. It is said, that the matter is concluded by that order and that certificate. But if there are facts upon the face of the certificate, which show and bring it legitimately before the Court that the certificate proceeded on a mistake, the Court is bound to set it right. That is done as to a Master's report, even after it has been confirmed by an order of the Court.

So, also, as to the decree, it was *per incuriam*, and I am bound to set it right. As to the certificate, I am bound to give such further directions as shall duly administer the trusts of the will. No such decree should have *been made; and, to say that I should put the parties who are entitled to the beneficial interest in the estate to the expense of a rehearing, in order to set matters right, is a proposition which I cannot entertain.

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v.
OWEN.

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But I am not driven to that consideration, for the *Attorney-General* was not a party to the cause. He is only a party as from to-day, and his right is not bound by the decree.

If the parties can show me, on affidavits, the amount in which the apportionment should be made between the real and personal estate, I will make the apportionment in the decree.

Declare, that the legacies (except the legacy of 19*l.* 19*s.* to the charity) and the costs of all parties, including the costs of the *Attorney-General*, be paid rateably out of the proceeds of the real and personal estate; and that the Crown is entitled to the surplus of the personal estate.

HARRISON v. LANE.

(2 Sm. & G. 249.)

1854.
March 6.

[Under the old practice of the Court of Chancery the residue of a testator's estate might be distributed on petition without prosecuting enquiries under an ordinary administration decree where the testator had been dead for 16 years and the residuary legatees were all *sui juris*, and the executors (who had paid the residue into Court pursuant to the decree) had made an affidavit that all the testator's debts had been paid and that there were no outstanding claims upon the estate.]

1854.
March 21, 22.

STUART,
V.-C.

[350]

LEE v. FLOOD.

EX PARTE LOTT.

(2 Sm. & G. 250—263; S. C. 2 W. R. 348.)

One of two partners, as bankers, lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person, in 1821, and died in 1833; the obligor continued to pay interest till 1843, when he died, and his executor paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his executor, and the surviving partner and another subsequently admitted, which the executor alleged was final, but which was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking on itself all the former liabilities and assets. In 1847, the firm in which the executor had continued a partner became bankrupt.

In a suit for the administration of the estate of the obligor, certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of his estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was possible that, in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established.

THIS was the petition of Mr. Harry Buckland Lott, as the executor of Harry Baines Lott, deceased; and it prayed, that the claim of the petitioner for the sum of 2,515*l.* 12*s.* 8*d.* with interest, from the 4th day of October, 1847, might be allowed; and that the same might be declared to be a valid and existing separate debt as against the estate of Christopher Flood, deceased, in the administration of his estate in the above suit.

The principal question was, as to the right of equitable set-off by a continuing partner, for partnership debts paid out of his separate estate, against the legal claim of the retired partner upon bond for a private loan.

It appeared, that Christopher Flood, deceased, and Philip Mules, were in partnership as solicitors; and on the 15th of September, 1821, they borrowed of Harry Baines Lott the sum of 6,000*l.*; and on the same day they gave their joint and several bond to Mr. Harry Baines Lott for securing the amount, with interest at the rate of 5*l.* per cent. per annum, on the 15th of March then next. By an indenture, of even date with the bond, Christopher Flood and Philip Mules, by way of collateral security, *assigned a debt of of 6,519*l.*, and interest, due to them, and certain hereditaments, together with a policy of assurance for 5,000*l.*, to Harry Baines

Lott, with powers to apply the monies received from the securities and policy in discharge of the debt of 6,000*l.* and interest.

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'
FLOOD.

Harry Baines Lott died on the 20th of June, 1833, having previously, by his will, dated the 16th of February, 1833, appointed Harry Buckland Lott, the petitioner, his sole executor and residuary legatee.

Interest on the sum of 6,000*l.* was paid to Harry Baines Lott, and after his decease to Harry Buckland Lott, until the 16th of September, 1842, when the interest ceased to be paid. On the 4th of October, 1847, the principal and interest due on the securities was 7,515*l.* 12*s.* 3*d.* On that day, Mr. Harry Buckland Lott, upon the decease of the person whose life was insured, received the 5,000*l.* secured by the policy, and thereout paid himself all the arrears of interest due, and a portion of the principal of 6,000*l.*, leaving a debt of 2,515*l.* 12*s.* 3*d.* then due as principal monies, being the amount which, with an arrear of interest from the 4th of October, 1847, constituted the claim of the present petitioner.

Long previously to 1821, Christopher Flood and Harry Baines Lott, together with one Edward Lott, carried on business together as bankers at Honiton, under the firm of Flood, Lott, and Lott, until the year 1831, when the above defendant Christopher Samuel Flood was admitted a partner; and from that time the business was carried on under the firm of Flood, Flood, Lott, and Lott. This partnership continued until the 20th of June, 1833, when Harry Baines Lott died.

Shortly after the death of Harry Baines Lott, his son and executor Harry Buckland Lott, the petitioner, was, in the year 1833, admitted a partner in the firm, not in the character of executor of Harry Baines Lott, but in his own private and individual capacity only.

In the year 1836, Edward Lott died; and in the month of March, 1843, Christopher Flood died, having, by his will, appointed Christopher Samuel Flood his sole executor, who duly proved the will, and took upon himself the execution thereof.

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Down to the 23rd of November, 1847, the banking business was continued by Christopher Samuel Flood and Harry Buckland Lott the petitioner, under the firm of Flood and Lott.

On that day, a *fiat* in bankruptcy was awarded and issued against Christopher Samuel Flood and Harry Buckland Lott, under which they were duly found and declared bankrupts.

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By the decree made in the above suit of *Lee v. Flood*, dated the 29th of April, 1848, it was referred to the Master to take an account of what was due to the plaintiff, and all other the creditors of the testator [Christopher (1)] Flood, and of his funeral expenses, and to compute interest on such of his debts as carried interest after the rate of interest they respectively carried; the other usual inquiries were directed; and the personal estate was ordered to be applied in a due course of administration. In pursuance of the advertisements issued by the Master under this decree, the petitioner, Mr. Harry Buckland Lott, carried in a state of facts and his charge before the Master. In April, 1852, he produced his securities, and claimed to be a creditor for 2,515*l.* 12*s.* 8*d.*, with lawful interest from the 4th of October, 1847.

The Master in the first instance allowed the charge as a valid debt against the estate; but, on a re-hearing, the Master allowed the claim as a claim only; and in his general report of the 17th of July, 1852, which was in due course shortly afterwards absolutely confirmed, he referred to the claim in the following terms:

[*253] “And a charge having been laid before me on the part of Harry Buckland Lott, as the sole executor of the will *and testament of Harry Baines Lott, deceased, together with an affidavit by the said Harry Buckland Lott, sworn the 27th day of January, 1849, and two several affidavits of John David Chambers, of 6, Old Square, Lincoln’s Inn, barrister-at-law, sworn the 14th day of February, 1849, and the 17th day of February, 1852, in respect of a sum of 2,215*l.* 12*s.* 3*¼d.*, claimed as due to him as such executor as aforesaid, on a certain bond of the said testator and the said Philip Mules, dated the 15th day of September, 1821, and on a covenant contained in a deed of even date, and made between the said testator and Philip Mules of the one part, and Barnaby John Stuckey Bartlett of the second part, and the said Harry Baines Lott of the third part, I have allowed the same as a claim against the estate of the said testator.”

It appeared by a memorandum made at the time of the re-hearing, that the Master allowed the charge as a claim only, on the ground that it had been alleged by or on the part of the defendant Christopher Samuel Flood, that the said Harry Baines Lott having been a partner with Christopher Flood, deceased, there were debts still due from that partnership; and that Christopher Flood, or his

(1) In the original report the testator is here by mistake called Charles Flood.—O. A. S.

estate, was a creditor of the said Harry Baines Lott and his estate, in respect of partnership debts paid by Christopher Flood or his estate.

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It appeared, that the sole ground of such allegation on the part of Christopher Samuel Flood was, as appeared by the 6th schedule and part of the 7th schedule to the Master's general report, that certain simple contract creditors of Christopher Flood, deceased, had come in and proved their debts in the suit against his estate in respect of certain promissory notes or other documents therein mentioned, which had been given and signed by the bankrupt firms of Christopher Flood, Harry Baines Lott, and Edward Lott, and Christopher Flood, Christopher Samuel Flood, Harry Baines Lott, and Edward Lott, prior to the death of Harry Baines Lott.

The 6th schedule and part of the 7th schedule were drawn up by the plaintiffs in this suit without the knowledge of Harry Buckland Lott, the petitioner, and without his having any opportunity of controverting the statements therein contained.

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The 6th schedule and part of the 7th schedule contained a long list of such creditors. the first item in which schedule was as follows :

£ s. d.

Due to Robert Brown, of Challenger Farm, in the parish of Hambury, in the county of Devon, yeoman, on a promissory note of the said testator and his then partners, Christopher Samuel Flood and Harry Baines Lott - - - - - 110 0 0
And for interest thereon, at 3*l.* per cent. from the 22nd day of August, 1847, to the — day of —, 1852 - - - - -

The other items were to the like purport.

On the 6th of July, 1849, Robert Brown filed a bill on behalf of himself and all other the joint creditors of Harry Baines Lott, deceased, against Gordon and another, his devisees in trust, and Harry Buckland Lott, the sole cestui que trust of the residue, and the sole executor of the testator Harry Baines Lott, seeking to charge the estate of Harry Baines Lott with payment of the debts of the firm in which he had been partner, secured on promissory notes which had been adopted by the subsequent firms, of which Harry Buckland Lott was a partner, and kept in force by regular payment of interest until the Bank failed in 1847. The plaintiff Brown failed to establish his equity against the estate of

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Harry Baines Lott, and the bill was dismissed with costs (1). The decision had reference only to the case of the plaintiff Brown, whose name was the *first in the list of the persons stated to be creditors of Christopher Flood in the 6th and part of the 7th schedules to the Master's report.

In that case it was adopted as a fact proved, that shortly after the death of Harry Baines Lott the affairs between his estate and the firm were favourably settled.

The cause was heard at the Rolls in May, and the Court gave judgment on the 3rd of November, 1852.

In the course of the hearing of this cause, it appeared that Mr. Brown and all other the creditors enumerated in the 6th and part of the 7th schedules had proved their debts in the bankruptcy of Christopher Samuel Flood and Harry Buckland Lott, the petitioner, and had received a dividend thereon, as being in truth creditors of the bankrupt firm.

The petitioner filed this petition in January, 1854, and after setting forth the above circumstances, stated that, upon the death of Harry Baines Lott, Christopher Flood, Christopher Samuel Flood, and Edward Lott, as the surviving partners, came to an account with the petitioner as the executor of Harry Baines Lott; and it being found that 2,400*l.* and upwards was due from the surviving partners to the estate of Harry Baines Lott, the same was paid, shortly after the death of Harry Baines Lott, to Harry Buckland Lott, as his executor, by the said Christopher Flood, Christopher Samuel Flood, and Edward Lott, in full settlement and satisfaction of all matters and claims subsisting between the said partnership and the estate of Harry Baines Lott.

The petition also stated, that the allegations on which the Master had determined to receive Mr. Harry Buckland Lott's claim as a claim only were unfounded; that no act had been done to alter the rights of Mr. Bunn and the other creditors in the schedules; that more than twenty years had elapsed since the death of Harry Baines Lott; and that all the debts of the firms, of which Harry Baines Lott was member, had been paid, or were either barred by *lapse of time or by the creditors accepting the substituted securities of the more recent firms; and that all the debts of Harry Baines Lott were paid, but that several of the legacies given by his will still remained unpaid, to an amount exceeding the claim of the petitioner.

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(1) See the case under the name of *Brown v. Gordon*, 96 R. R. 137 (16 Beav. 302).

The prayer of the petition was, that the petitioner's charge and claim of 2,515*l.* 12*s.* 3*d.*, with interest from the 4th of October, 1847, might be allowed, and that the same might be declared to be a valid, existing, and separate debt as against the estate and assets of Christopher Flood; and that an account might be taken of what was due to the petitioner as executor, and that he might be paid *pari passu* with the separate specialty creditors of Christopher Flood.

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The petition was met by the affidavits of the defendant Christopher Samuel Flood denying absolutely, and of another deponent denying from the account books, that any settlement of accounts had ever been come to with Harry Buckland Lott as the executor of Harry Baines Lott, on his decease; but that the account between Harry Baines Lott and the successive firms was kept open, and carried on from time to time.

The state of facts which was carried in before the Master as the state of facts of Harry Buckland Lott was the same state of facts as was carried in by Sir Edmund Sanderson Prideaux and others, as the assignees of the bond and covenant of 1821, under an assignment made to them in April, 1844, for a full valuable consideration.

Mr. Elmsley and Mr. Hetherington, in support of the petition:

The decision in *Brown v. Gordon* (1) has established the non-liability of the estate of Harry Baines Lott to the creditors whose debts formed the only ground of objection before the Master to the admission of the claim as a debt by the Master in the administration of the estate of Christopher *Flood, the testator in this cause. It is true, that, in the administration of this estate the Master finds these joint debts to be debts of the separate estate of Christopher Flood also. That is consistent with *Brown v. Gordon*, and with the settlement of the accounts come to on Harry Baines Lott's death, when the new firm adopted the liabilities of that firm. The affidavits for the respondents deny that there was a settled account; but the accounts show a settlement, which, at this distance of time, must be assumed to have been final.

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Mr. Bacon and Mr. Lewin for the plaintiff in the cause.

Mr. Wigram and Mr. Hanson for the defendant Christopher Samuel Flood:

Whatever accounts were come to on the death of Harry Baines

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Lott between his estate and the surviving partners, it was not such a regular account as to constitute a settlement of accounts, and to entitle his representative to say that all the future transactions were by the survivors alone.

The case of *Brown v. Gordon* does not seriously affect the present question. The plaintiff in that suit was one of the scheduled creditors of the firm to whom the estate of Christopher Flood is reported by the Master to be separately liable. The case of *Brown v. Gordon* has decided that Mr. Brown, one of these creditors, is not also a creditor upon the separate estate of Harry Baines Lott, on the ground that he had adopted the subsequent firms as his debtors, and had impliedly released the estate of Harry Baines Lott. That depended on conduct and circumstances, which are not shown to apply to the other scheduled creditors. * * *

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The Master admitted this claim as a claim only, in February, 1852. He made his report in July, 1852. All the facts which the petitioner relies on were known to him then, and he ought to have excepted to the report forthwith. A creditor is let in after the report, only when he has no knowledge of the time when he should bring in his claim. After such delay the petitioner ought at least not to be allowed to come in, except upon payment of costs: *Gillespie v. Alexander* (1), *Sawyer v. Birchmore* (2), *David v. Frowd* (3).

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Mr. Elmsley, in reply :

The case of *Brown v. Gordon* entirely exonerates, at least in principle, the estate of Harry Baines Lott from the scheduled debts admitted against Christopher Flood's estate. [He also cited *Harris v. Farwell* (4).]

THE VICE-CHANCELLOR :

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The more this discussion has proceeded the more satisfied *have I become that the Master's objection to admitting the claim of the representative of Harry Baines Lott to be a creditor upon the estate of the late Christopher Flood cannot be supported. There may be some objections to the form of the present application, but enough is before me upon this petition to raise the substantial question.

(1) 27 R. R. 35 (3 Russ. 130).

(2) 44 R. R. 93 (2 My. & Cr. 611).

(3) 36 R. R. 308 (1 My. & K. 200);

and see *Brown v. Lake*, 75 R. R. 75

(1 De G. & Sm. 144).

(4) 92 R. R. 291 (15 Beav. 31).

Upon the whole of the case, I am of opinion that the petitioner has established his claim, as the representative of Harry Baines Lott, to be admitted in the suit as a specialty creditor of Christopher Flood, deceased; and that there is no equitable set off to his claim which has been as yet proved.

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The Master, by the memorandum which he made upon the hearing before him, gave as his reason for allowing the claim as a claim only, and not as a debt, that it was alleged on the part of the defendant Christopher Samuel Flood, that, Harry Baines Lott having been partner with Christopher Flood, deceased, there were debts still due from that partnership; and that Christopher Flood or his estate was a creditor of Harry Baines Lott and his estate in respect of partnership debts paid by Christopher Flood or his estate. The words of the memorandum show that there was not sufficient reason for not allowing the claim as a debt. It is only alleged that there is a set-off. If it had been proved that Christopher Flood was a creditor of Harry Baines Lott in respect of the partnership debts to which his estate was liable, and although the amount had not been ascertained, the case would have been different. There may be some probability, that, in winding up the affairs of the partnership, some such claim may be ascertained; but it is clear that it cannot be ascertained without great difficulty, or without decision on questions of vast importance, and by no means of easy solution.

It is, however, said, that the Master was justified in the *view which he took of this claim, because there appears in the sixth schedule to his report a class of creditors to whom Harry Baines Lott is liable as a partner, together with the testator and Christopher Samuel Flood. In reference to this view of the case it must be remembered, that Christopher Flood, Christopher Samuel Flood, and Harry Baines Lott were partners, but that that partnership was dissolved by the death of Harry Baines Lott in 1833. Various deposit notes of that partnership are still outstanding, which still continue unpaid. As to them, there has been a dealing ever since by the continuing members of the firm, of whom the petitioner Harry Buckland Lott was one. Now it is contended, that, as interest was continually paid by the firm, of which the petitioner, as the representative of Harry Baines Lott was one, that was an acknowledgment of those debts which bound the assets of Harry Baines Lott. That is a very difficult question. I am, however, relieved from much of that difficulty by the circumstance

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that Brown, the first of the creditors in the sixth schedule, has taken proceedings in this Court before the Master of the Rolls, for the purpose of establishing his claim as against the estate of Harry Baines Lott, and that he has totally failed; his bill was dismissed with costs. How, therefore, can I be justified in assuming that these debts (that of Brown, the first in the schedule of them, having failed,) are such outstanding demands against Christopher Flood's estate as would make that estate a creditor for contribution against the estate of Harry Baines Lott. It is true, that, at the time of the Master's report, the decision at the Rolls had not been made; but, it having now been made, I am of opinion that I cannot, without contravention of the principles of the law of contract, hold that any claim of the estate of Christopher Flood exists against the estate of Harry Baines Lott in respect of those scheduled debts.

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All that I am asked to do is, to allow Harry Baines *Lott's representative to be a creditor on the estate of Christopher Flood, and I am bound to do so.

It is said, however, that the petitioner is wrong in point of form; and that the petitioner was negligent in not having excepted to the Master's report. This petition is in the nature of an exception to that report. If the receiving this petition were an indulgence, the petitioner should pay the costs of his petition. But this does not appear to me to be a case of indulgence. The Master's attention should have been drawn to the fact of the proceedings in the Rolls Court; and it is the more remarkable that it was not, because the date of the Master's report is after the hearing, though it was before the decision. This cause having come on for further directions, with the claim admitted as a claim and not as a debt, assets were left in Court undisposed of under the further directions, sufficient to meet the present claim. It was not an improper proceeding when the decree at the Rolls had removed the Master's difficulty, and had settled an important point in favour of the petitioner, that he should come to this Court with his petition in the nature of exceptions to the report. This is therefore not to be put on the footing of an indulgence, so as to make the petitioner pay the costs of this proceeding. I cannot think that this petition is more expensive than exceptions would have been. There was a slip on the part of the Master; and the conduct of all the parties before him, in not informing him of the proceedings at the Rolls, renders it improper to charge the petitioner with the costs of this petition.

Upon the whole, my opinion is, that the petitioner is entitled to be admitted to proof as a specialty creditor, and to have a sufficient part of the fund in Court appropriated to pay him, or to be paid *pari passu* with the other separate creditors.

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Circumstances may arise to show that the Master has come to a right conclusion; it may turn out that the estate of Christopher Flood may have a claim against the estate *of Harry Baines Lott. Coming to the conclusion I do, the petitioner must not have the fund as his own, but it must be held by him as executor, as part of the estate of Harry Baines Lott, and as assets.

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The amount must be carried over to a separate account.

By the order it was declared, that the petitioner Harry Buckland Lott, as executor of Harry Baines Lott, deceased, was entitled to stand as a creditor of Christopher Flood, deceased, for the amount due to him for principal and interest on the bond in the petition mentioned, bearing date the 15th of September, 1821. And it was ordered, that an account be taken of what was due to the petitioner Harry Buckland Lott, as executor as aforesaid, for principal and interest on the debt of 6,000*l.*, secured by the bond in the pleadings mentioned; and that so much of the 8,217*l.* 4*s.* 4*d.*, Bank 3*l.* per cent. Annuities, which, by the proceedings in the cause, appeared to be standing in the name of the Accountant-General in trust in the cause, as would raise what, upon taking the account, should be found to be due for such principal and interest, should be sold with the privity of the Accountant-General; and that one of the cashiers of the Bank should have notice to attend and receive the money to arise by the said sale, who, upon the receipt thereof, was to pay the same into the Bank with the privity of the said Accountant-General, to be there placed to the credit of the cause; and that the money to arise by the said sale, when so paid into the Bank, should be carried over to the credit of this cause, to an account to be intitled "The account of Harry Buckland Lott, executor of Harry Baines Lott, deceased," subject to the further order of the Court. And that the said sum, when so carried over, was not to be paid out without notice to the defendant Christopher Samuel Flood and to Sir Edmund Sanderson Prideaux and others, the assignees of the bond and covenant of 1821.

1854.
April 28.

HICHENS v. KELLY.

(2 Sm. & G. 264—266.)

In a foreclosure suit, a trustee, in whom was vested the legal estate in the mortgaged property, and who had agreed to convey it to the plaintiff when required, is a necessary party.

[The VICE-CHANCELLOR said that this case could not be distinguished from *Wood v. Williams*, 20 R. R. 291 (4 Madd. 186), and he followed that case.]

1854.
April 29.

LAZONBY v. RAWSON.

(2 Sm. & G. 267—271.)

[Affirmed on appeal as reported in 4 D. M. & G. 556.]

1854.
May 31.

LOVEGROVE v. COOPER.

(2 Sm. & G. 271—273.)

STUART,
V.-C.
[271]

Monies arising under a will, and paid by the executors into Court in a creditor's suit, held legal assets.

The proceeds of the sale of the real estate of an intestate directed by the Court to be sold for payment of debts, and paid by the purchasers into Court, held to be distributable between the creditors as if they had been legal assets (1).

THIS was a creditor's suit. By the decree, dated the 10th of March, [1852] (2), the usual accounts were directed to be taken of the estate of Charles Cooper, who died intestate, [and the intestate's real estates were ordered to be sold for payment of debts].

By his report, dated the 18th of February, 1854, Master Humphrey found, *inter alia*, that the intestate was indebted on specialty debts to the amount of 1,223*l.* 7*s.* 9*d.*, and on simple contract debts to the amount of 2,105*l.* 14*s.* 7*d.* The Master further found, that there was then standing in the name of the Accountant-General, in trust, and to the credit of the above-mentioned cause, 2,825*l.* 3*s.* 3*d.* in Bank 3*l.* per cent. Annuities

(1) The proceeds of real estate distributable under 3 & 4 Will. IV. c. 104, are "statutory assets," and cannot be properly described either as "legal assets" (*Bain v. Sadler* (1871) L. R. 12 Eq. 370, 40 L. J. Ch. 791, 25 L. T. 202) or "equitable assets" (*Ferguson v. Gibson* (1872) L. R. 14 Eq. 379, 41 L. J. Ch. 640). These distinctions have lost much of their former importance since specialty creditors and

simple contract creditors are now paid *pari passu*, except in a few cases, as to which see *Bentinck v. Bentinck* [1897] 1 Ch. 673, 76 L. T. 284, and the cases there cited; and see also *In re Samson* [1906] 2 Ch. 584, 76 L. J. Ch. 21, 95 L. T. 633, C. A.—O. A. S.

(2) The original report elsewhere refers to the decree as made on the 10th March, 1849, which seems to be the correct date.

and cash; that such Bank Annuities and cash, together with the personal estate outstanding and unreceived, formed the personal estate of the said intestate.

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The Master found also, that, on the 26th day of July, 1851, Thomas Mansell and W. E. Cooper (1) paid into Court to the credit of the above-mentioned cause, "The Real Estate Account," the sum of 154*l.* 1*s.*, being the balance [of the proceeds of the sale of the real estate of the deceased which had been sold pursuant to the decree, after deducting the principal, interest, and costs which were due on the security thereof].

The fund found by the Master to be in Court, exclusively of the real estate account in Court, arose as follows: In the suit of *May v. Grave*, which was a suit to administer the estate of William May, the Master found that the children of Ann Cooper, deceased, of whom the intestate was one, were entitled each to one-fifteenth part of two sums of 4,000*l.* Reduced Annuities, and 1,000*l.* New 8½ Consols, *under the will of the said William May, the testator in the cause.

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On a petition in that suit, the one-fifteenth share, amounting to about 800*l.*, was paid to Mrs. Cooper, the defendant in the suit of *Lovegrove v. Cooper*, and was immediately paid by her into Court, to the credit of *Lovegrove v. Cooper*.

On the 21st of November, 1850, a motion was made in the suit of *Lovegrove v. Cooper*, by the executors of Catherine May. that they might be at liberty to pay into Court, to the credit of the above-mentioned cause, the sum of 1,567*l.* 7*s.* to the account of the intestate's share in William May's estate. The money was accordingly paid in and invested.

A similar motion was made on the 21st of December, 1851, by the trustees of Charles May, for liberty to pay into Court the sum of 980*l.* 15*s.* 6*d.*, as Charles Cooper's share of the residuary estate of Charles May, deceased. The money was accordingly paid in. * * *

Mr. Walker and *Mr. F. O. Haynes*, for the simple contract creditors, submitted, that the whole fund, including the proceeds of the real estate, which had been directed to be sold, being recoverable in equity, became equitable assets. It was held by Lord *HARDWICKE*, that an equity of redemption was equitable assets: *Hartwell v. Chitters* (2).

(1) It appears, indirectly, from the original head-note that they were the purchasers of the real estate.—O. A. S.
(2) *Amb.* 308.

LOVEGROVE Mr. Bacon and Mr. Busk appeared *contrà*, but were not
v.
COOPER. called on.

Mr. Faber and Mr. Ellis appeared for other parties.

[273] His Honour said, he thought it was now well settled, that assets actually realised and in the hands of the executor as money were legal assets. The sums in question, though paid into Court, were as to the rights of the creditors in the same situation as in the hands of the executor.

CHICK v. BLACKMORE.

1854.
May 31.

(2 Sm. & G. 274—277; S. C. 23 L. J. Ch. 622; 2 W. R. 488; 23 L. T. O. S. 285.)

STUART,
V.-C.
[274]

On a sale, by the executors, of the book debts of their testator, the debtors to the estate being also creditors, both on trade and also private debts, but claiming no right of set-off: Held, that the purchaser was entitled only to the balance remaining due, after deducting both trade and private debts due from the testator's estate.

THE suit was instituted to administer the estate of Elijah Chick, deceased, innkeeper and brewer, of Sidmouth, Devonshire. By a decree, made on the 24th of May, 1850, it was referred to the Master, *inter alia*, to take the usual accounts.

By his report, dated the 6th of March, 1854, the Master found, that the testator died on the 10th of September, 1849; and that at the date of his will he was possessed, *inter alia*, of the freehold hereditaments, known respectively as the "Ship Inn" and Town Brewery at Sidmouth, the new "Commercial Inn" and the "Marine Hotel" also at Sidmouth; and the Master found that such real estates and certain leasehold tap and stables adjoining thereto, together with all the machinery, plant, stock-in-trade, household furniture, book debts, and other personal estate and effects, free and clear of and from all mortgage debts and other liabilities except the rents, &c. &c., were, on or about the 29th day of November, 1849, sold to the defendant Elizabeth Stockdale, then Elizabeth Chick, widow of the testator, by private contract, for a sum of 4,100*l.*, which, with 213*l.* in part payment of interest, had been received by the executors.

It appeared in evidence that the testator, at the time of his death, was indebted for trade debts in a sum of 147*l.* 18*s.* 7½*d.* to various persons, who were also indebted to him on a cross account.

The testator also owed a sum of about 75*l.* for private debts, to persons who were also his debtors. After the sale to the testator's

widow, the debtors on the books of the testator paid to his widow the amount due from them, without claiming any right of set off. The executors subsequently paid to the parties respectively entitled the *amount due to them from the testator's estates, without claiming to deduct the amount due from them to the estate, which they had paid to the widow.

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v.
BLACKMORE.

[*275]

The Master, at the request of the defendants, certified that he had disallowed the several payments made by them, set forth in the 4th schedule (the trade debts) to his report, such payment having been made by them subsequent to the sale to the said Elizabeth Stockdale; and the several persons to whom such payments were made being indebted to the said testator's estate on account of the trade or business carried on by him, in sums which ought to have been set off against the payments so made by them as aforesaid, and allowed by the said E. Stockdale as the purchaser of the book debts, as mentioned in the said sale, he being of opinion, in settling the book debts of the said debtors to the said testator's estate, that the said Elizabeth Stockdale was only entitled, in respect of her purchase of such book debts, to the balances resulting from a fair taking of the accounts in respect of such book debts respectively; but he had allowed similar payments where the same became due in respect of private debts of the said testator, not considering that such private debts came under the description of book debts, or that the same could be set off against the sums due in respect of the said testator's trade or business; and such payments so allowed by him are included in the said account of the said defendants.

Mr. Bacon and *Mr. C. M. Roupell* for the legatees, contended, that the words "book debts," which were perfectly well understood in the mercantile world, signified the balance due to the testator's estate, after deducting every sum in respect of which a right of set off existed.

Mr. Malins, for the executors, contended, that the words "book debts," meant such accounts as appeared due on the *books. How could a purchaser know what he was purchasing if the sums appearing due on the trade books were to be reduced by whatever amount any person might be able to establish against the testator's estate. To introduce the rule now insisted on, would be to deter every person from purchasing this species of property. No injury to the estate could result from holding that the book debts signified

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BLACKMORE. what appeared due on the books, because, in such case, the property would always command an adequate price in the market.

Mr. Jessel appeared for the widow, and claimed to be entitled to the amount appearing due on the books. There was here no case of set off, inasmuch as the debts had been paid by the debtors without objection. Any other construction of the words "book debts" would be to compel creditors, whether they would or not, to insist on a set off.

Mr. Erskine appeared for the executor of Samuel Chick the elder.

THE VICE-CHANCELLOR :

The question is, whether what was sold by the executors to the widow under the denomination of book debts, was the balance of what was due to the testator's estate when the accounts were properly adjusted; or whether, on the sale of the book debts, the widow was entitled to the amount appearing due on the books?

The testator was a brewer and kept books, though not very regularly as it appeared, in which were entered only the debts due to him. Both the executors and the purchaser say that in this contract they dealt only with what appeared due upon the books themselves.

[*277] Generally the book debts are the balance only of what, on the adjustment of the testator's accounts, is due to his estate from those persons with whom he dealt. It is contended, *however, that the meaning of the words "book debts" is the amount appearing due on the books; but such a construction appears to me erroneous, and likely to lead to a great deal of difficulty in administering an estate. It would not be contended, that, if the entry in the books were erroneously a larger sum than was actually due, the purchaser was entitled to a sum equal to the amount stated in the books. Then, it is said, that, to construe "book debts" as the balance only which is due, will be to establish as imperative the law of set off, which is at present only optional, and therefore to vary the rights of purchasers. But on what principle could the debtor be allowed the option of depriving the testator's estate of the right of having the account settled so as to ascertain and receive the actual balance, which is the real amount of the debt? In my opinion, what is sold is what can be recovered in the name of the executor, which must always be subject to the right of set off in the debtor. I must look to the assets; and such a construction of the contract as would give

to the purchaser of the book debts not the real debt due to the estate, but something possibly very different, cannot be the right construction. I think, therefore, that the Master was right in disallowing the payment of the trade debts by the executors.

CHICK
f.
BLACKMORE.

As to the private debts of the testator, that is, the debts unconnected with his business, which the Master has allowed, I think the same principle is applicable. The true criterion is, whether, to an action in the name of the executors, the creditor would be entitled to plead a set off. The law as to the right of the creditor to a set off makes no distinction between private and trade debts. In either case the debt due to the testator's estate would be liable to be reduced by the amount due from the testator. I think the Master was wrong in allowing to the executors the payment out of the assets of the private debts.

LASLETT v. CLIFFE.

(2 Sm. & G. 278—283.)

1854.
May 8.
June 6.

Even under the 15 & 16 Vict. c. 86, s. 48, the Court had power, after decree for foreclosure, to direct a sale.

[Under the Conveyancing Act, 1881, s. 25, the Court can direct a sale at any time before the foreclosure has become absolute: *Union Bank of London v. Ingram* (1882) 20 Ch. Div. 463, 51 L. J. Ch. 508, 46 L. T. 507.]

MANNING v. PURCELL.

(2 Sm. & G. 284—295.)

1854.
March 23.

[Varied on appeal as reported in 7 D. M. & G. 55.]

COOKE v. WAGSTER.

(2 Sm. & G. 296—301; S. C. 23 L. J. Ch. 496; 18 Jur. 849; 2 W. R. 434; 23 L. T. O. S. 293.)

1854.
May 2, 3.

STUART,
V.-C.
[296]

A testator sold lands, and left 900*l.*, the purchase-money, in the hands of his agent, a land surveyor, to be invested on security; the agent died, and, as was supposed, insolvent, without having invested the money. The testator then, by his will, gave to his wife all his ready money and securities for money, money in the funds, and money in the Bank or Banks (if any) due or owing to him at the time of his decease; but the will did not contain any other general disposition of residuary property: Held, that the 900*l.* passed; that on the whole will there appeared an intention that all his property should pass, and that the words he had used should include everything, there being no other assets.

MR. PERCEVAL, the testator in the cause, made his will, dated the 29th of April, 1848, containing the following dispositions:

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“First, I order and direct my just debts, funeral and testamentary expenses, and expenses of proving this my will, to be paid by my executrix and executor hereinafter named as soon as conveniently may be after my decease. And I give and bequeath unto my dear wife Ann Perceval, all my ready money and securities for money, money in the funds, and money in the Bank or Banks (if any) which may be due and owing to me at the time of my decease; And also all my household goods and furniture, beds and bedding, plate, linen, china, glass, pictures, clocks, watches, books, and papers, and all household stores of every description, which I am now or may be possessed or entitled unto at the time of my decease, to and for her use and benefit absolutely.” The will contained no other clause making any disposition of or affecting his personal estate.

The testator sold some houses, which were situate in Manchester, for 999*l.* Mr. Chambers, a surveyor, was his agent in the sale. He conveyed the property to the purchaser in May, 1847. Shortly afterwards the purchaser paid the 999*l.* to Mr. Chambers, by the order of the testator, who directed Mr. Chambers to receive and retain it, in order that he might invest it in any mortgage security he should approve of. Having received the 999*l.* Mr. Chambers settled accounts with the testator; and a balance of 900*l.* remained in his hands for the purposes of the investment. Mr. Chambers died in October, 1847, and the testator used to refer to this sum when he spoke of it as money in Chambers’ hands. The money remained in Chambers’ hands uninvested. At his death [*297] Mr. Chambers’ *affairs were embarrassed, and the testator thought that the whole or nearly the whole amount was lost. The testator having made his will in April, 1848, died in July, 1848. After a suit for administering the estate of Chambers the amount had been received.

This was a suit by the personal representative of Mrs. Perceval, the widow, against the executor of the testator.

The cause came on upon a motion for a decree.

The only question in the cause was, whether the 900*l.* left in the hands of Mr. Chambers, and at the date of the testator’s will and of his death due from the representatives of Mr. Chambers to the testator, passed to Mrs. Perceval under the above clause, or was entirely undisposed of by the testator’s will.

Mr. J. V. Prior and *Mr. Eddis* for the plaintiff [cited *Parker*

v. *Marchant* (1), *Vaisey v. Reynolds* (2), *Fryer v. Ranken* (3), and distinguished *Smith v. Butler* (4)].

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Mr. Charles Hall for the executor [cited *Gosden v. Dotterill* (5)]: [298]

Here the testator knew, before he made his will, that Chambers was dead, and that the fund was so circumstanced as that it could not be “ready money,” and there is no explanatory context indicating the testator’s intention that it should pass. *Parker v. Marchant* (1) is in favour of the defendant. It is confined to a balance at a banker’s, and if the bankers had failed, the uncertain amount to be received on a dividend would not be ready money. [He distinguished *Smith v. Butler* (4) and *Fryer v. Ranken* (3), and cited *May v. Grave* (6).]

Mr. J. V. Prior, in reply. [299]

THE VICE-CHANCELLOR :

It is impossible for me to reconcile some of the cases which have been cited in this case with other authorities. In *Parker v. Marchant* (1) it was decided, that a balance at a banker’s passed under the words “ready money.” On a similar principle to that decision the VICE-CHANCELLOR OF ENGLAND held, in *Fryer v. Ranken* (3), that unreceived dividends of stock due at the testator’s death passed by words such as are used by this testator. It is not possible to reconcile these cases with *May v. Grave* (6), in which the Vice-Chancellor KNIGHT BRUCE held, that unreceived dividends did not pass under a bequest of ready money. But, after exhausting all the authorities as to where the line is to be drawn, it is the testator’s will itself in each case that must be resorted to for ascertaining his intention.

In the present case, the words of the testator are remarkable; for in this will he uses the word “money” four different times in describing the several sums which he intended to pass by his will. He gives “all my ready money, and securities for money, money in the funds, and money in the Bank or Banks (if any) at the time of my death.” The sum of money or balance due to the

(1) 57 R. R. 341 (1 Ph. 356).

(2) 29 R. R. 4 (5 Russ. 12).

(3) 54 R. R. 328 (11 Sim. 55).

(4) 72 R. R. 132 (3 Jo. & Lat.

(5) 36 R. R. 244 (1 My. & K. 56).

(6) 74 R. R. 372 (3 De G. & Sm.

462).

COOK
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WAGSTER.

testator, upon which the question in this case arises, is the sum of 900*l.*, which had been in the hands of Mr. Chambers to be invested on security. Mr. Chambers having died in the testator's lifetime, this particular sum of money thus deposited with Chambers remained uninvested, and to be accounted for by Chambers' executors. Under these circumstances the sum in question is the testator's money in the hands of Chambers' executors.

[300]

It has, however, been contended, that it passed as "ready money;" but it is impossible to hold that it passed by such a bequest. My doubt, however, is, upon reading the word relied upon in support of the claim with the context, whether, upon the plain interpretation of the word "money," this money in the hands of Chambers' executors passed by this bequest. Reading the whole of the passage in which the word "money" four times occurs, I think it fairly bears the interpretation which the plaintiff's counsel put upon it. They contend with much force, that the testator intended to pass all his money, whether invested or uninvested, whether ready money or money in the funds or in the Bank, or due and owing to him. It is difficult to understand what money of his he could have intended to leave undisposed of when he so frequently made use of the word "money." It may be questioned whether the words "if any" should be taken as referring to "money" or "Banks;" but there is no necessity for introducing any such narrow question into the case.

When I find the testator enumerating four general descriptions of money, and when I know that the money put into Chambers' hands to be invested was not so invested through his miscarriage, I cannot bring myself to exclude the money in the hands of Chambers' executors from the gift. The great difficulty I have felt is as to the actual position of that money at the time of the testator's death. Lord ST. LEONARDS decided upon a sound ground, that, under the word "money," taken with the context in that case, the unsettled balance of a current account will not pass. But, in the present case, where the word is so often repeated, I think that the money in question, which was a sum certain dedicated to investment upon security, and not a floating balance of an account, passed upon the plain interpretation of the will. It is a circumstance of importance in this case, that, unless this sum was included in this bequest, the testator must have died intestate

| *with regard to it, for there is no gift of the residue. The

inclination of the Court, in cases of doubt, is not to favour intestacy where the intention is manifest.

Upon these grounds I feel myself bound to hold, that the sum due from Chambers' executors passed by the words of this will.

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WAGSTER.

DOLLOND v. JOHNSON (1).

(2 Sm. & G. 301—305; 23 L. J. Ch. 637; 18 Jur. 767; 2 W. R. 505; 23 L. T. O. S. 285.)

1854.
June 7.

STUART,
V.-C.
[301]

In a suit to administer the estate of a testator, judgments obtained against his executors are payable according to their respective dates out of legal assets.

THOMAS BINNS TURNER, the testator in the cause, on the 1st of January, 1836, gave his bond to his father Mr. Charles Turner, in a penal sum of 12,000*l.*, to secure 6,000*l.* On the 30th of March, 1843, Mr. Charles Turner died, having by his will appointed the plaintiffs his executors.

After the death of Charles Turner, the testator Thomas Binns Turner paid his father's executors a sum on account of the debt secured by the bond.

On the 10th of March, 1846, Thomas Binns Turner gave his bond to his brother John Cusson Turner, in a penal sum of 4,000*l.*, to secure the sum of 2,000*l.*

Thomas Binns Turner died on the 22nd October, 1846, having appointed the defendant executor of his will.

On the 15th of December, 1847, the plaintiffs commenced an action against the defendant, as the executor of Thomas Binns Turner, upon his bond, upon which they recovered judgment for assets *quando acciderint*, which was signed on the 3rd of January, 1848, and registered in the office of the Common Pleas on the 1st of February, 1848.

On the 19th of January, 1848, John Cusson Turner commenced an action against the defendant, as executor of Thomas Binns Turner, on the bond for 4,000*l.*, in which he obtained judgment, and signed it on the 18th, and registered it at the Common Pleas on the 14th of March, 1848.

On the 29th of June, 1848, the plaintiffs, as specialty *creditors of Thomas Binns Turner, filed their bill in this Court on behalf of themselves and of all other creditors, to administer the estate of the testator.

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(1) *In re Bentinck* [1897] 1 Ch. 673, 76 L. T. 284.

DOLLOND
v.
JOHNSON.

On the 8th of July, 1848, the cause came on to a hearing, when the usual references were made to the Master. On the 23rd of November, 1853, the Master made his report, by which he found that there was due from the estate of Thos. Binns Turner to the plaintiffs, in respect of the bond debt, interest, and costs of the judgment of the 3rd of January, 1848, the sum of 7,128*l.* 18*s.* 2*d.* The Master further found, that, in compliance with the advertisements inserted by him in the *London Gazette*, other specialty and simple contract debtors had come in and proved debts to the amount of 12,932*l.* 13*s.* 9*d.*

On the 18th of March, 1854, the cause came on for further consideration; when a question was raised whether the judgment debt of the plaintiffs was entitled to priority over the judgment recovered by John Cusson Turner on the 13th of March, 1848.

Mr. Wigram and *Mr. Leach* for the plaintiffs:

It was the well-established principle of this Court that the creditor who had been most diligent should have priority. *Ashley v. Pocock* (1) determined that the executor ought to have first paid the creditors who had used the first diligence.

The question was, in fact, decided in *Morrice v. The Bank of England* (2), where the decree directed that the assets should be applied to the payment of the several judgments according to their priority. The same principle was acted on in the case of *Abbis v. Winter* (3). [*Perry v. Phelps* (4), *Larkins v. Paxton* (5), and other cases were cited, but were not referred to in the judgment.]

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Mr. Faber appeared for the second judgment creditor, and contended, that, in this Court, both judgments were payable rateably.

Mr. Bird appeared for the executor.

THE VICE-CHANCELLOR:

This is a creditors' suit, by the plaintiffs, Dollond and Huggins, on behalf of themselves and all other creditors, for the administration of the assets of the testator Turner.

The plaintiffs, after the death of the testator Turner, recovered

(1) 3 Atk. 208.

(2) Decided in 1736, Cas. temp. Lord Talbot, 217; also reported in the Appendix to 3 Swanst. p. 573; and see next page.

(3) Decided in 1733, and reported from Lord Colchester's MSS. in a note to 3 Swanst. p. 578.—O. A. S.

(4) 7 R. R. 331 (10 Ves. 33).

(5) 50 R. R. 164 (2 Beav. 219).

judgment against the defendant, his executor. Afterwards Turner, another creditor, also recovered a judgment against the executor. The question is, whether these two creditors, who have both obtained judgments against the executor for assets *quando acciderint*, are to be paid rateably, or whether the plaintiffs, whose judgment is prior in point of date, are entitled to payment in preference to the other, whose judgment is later in date?

DOLLOND
v.
JOHNSON.

For the plaintiffs it has been argued, on the authority of the case of *Morrice v. The Bank of England* (1), as well *as on the authority of other cases, that they had obtained a right to priority of judgment by reason of the prior date of their judgment. This right of priority is said to accrue as the reward of the greater diligence of the party who can first obtain judgment. A still higher degree of diligence would have been shown by obtaining judgment against the testator in his lifetime. But it is admitted, that, as to all judgments obtained against the testator in his lifetime there can be no priority, but all must be paid rateably. It is not easy to see how the plaintiffs' claim to priority, on the ground of diligence against the executor, which would have had no effect if exercised against the testator, can prevail.

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The authorities, however, show that it has been the practice of the Court to recognise this right of priority as to judgments obtained against an executor. In *Morrice v. The Bank of England* the decree directed the payment of the judgment debts according to their priority of date. On the same principle, in the case of *Abbiss v. Winter*, a similar priority is recognised as to decrees against the assets at the suit of individual creditors, which are held to bind the assets according to date, and to have priority accordingly. In the present case, the decree is on behalf of all the creditors; but, in addition to the plaintiffs' diligence in first obtaining judgment against the executor for their own debt, they were most diligent in obtaining the decree of this Court for the general administration.

The question is concluded by authority. I am bound to hold; and I do so with reluctance, and only because bound by the authorities, that the plaintiffs' judgment is payable in priority to that of the other judgment creditors. Lord HARDWICKE said, in the case of *Morrice v. The Bank of England*, that it would be more agreeable to natural equity and justice to have the assets distributed *pro ratâ*; and that he considered it a defect in the law, that it

(1) See note (2) last page.

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JOHNSON,
[305]

should not be in the power of a court of equity or of a *court of law to enforce a distribution of assets *pro rata* among the creditors without consent. Nevertheless, Lord Hardwicke did not feel himself authorised to remedy this defect in the law. And as I believe there is no case in which the course adopted by him in this respect has not been followed, I am bound by authority, but with regret, to recognise that priority which is sanctioned by the law of this Court.

POWDRELL v. JONES.

1854.
June 10.

STUART,
V.-C.
[305]

(2 Sm. & G. 305—310; S. C. 23 L. J. Ch. 608; 18 Jur. 1048; 2 W. R. 513;
23 L. T. O. S. 304.)

Articles of partnership under seal, containing the usual covenant by the partners to be true and just to each other in all their dealings, and by which each bound himself, his executors, &c. unto the other, his executors, &c. in the penal sum of 5,000*l.* for the due performance of the partnership articles; on the death of one partner, he was found indebted to the partnership in 11,064*l.*: Held, that the debt was by specialty for 5,000*l.* only, there being no covenant or obligation in the deed for payment of the general balance on the settlement of the partnership accounts, but only for 5,000*l.*; the express contract for a definite sum excluding any implication for a larger sum as a specialty debt.

THIS was a motion on behalf of the defendant Richard Parry Jones, that the certificate of his Honour's chief clerk might be varied, by substituting in the schedule of specialty debts the sum of 11,064*l.* 10*s.* 5*d.*, as due to the said defendant, instead of the sum of 5,000*l.* therein stated to be due to the defendant as a specialty creditor of the testator by virtue of the partnership articles, dated the 26th of May, 1843, and by expunging from the schedule of simple contract debts the sum of 6,064*l.* 10*s.* 5*d.*, being the balance beyond the amount of 5,000*l.*

A cross motion was also made to vary the certificate, so far as it allowed the 5,000*l.* to the defendant Jones as a specialty debt.

The bill was filed by Richard Powdrell on behalf of himself and all other the creditors of George Harper, deceased, and it prayed that his estate might be administered in this Court.

By articles of partnership, dated the 26th of May, 1843, made between George Harper and the defendant R. P. Jones, they agreed to carry on business together at Whitchurch in Salop, as solicitors.

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The articles contained several stipulations, which were as follows:

"That, in case either partner should advance for the partnership business any sum exceeding in amount what should have been advanced by the other partner, such excess should be repaid with interest at 5*l.* per cent.

"That the rent &c. should be paid out of the profits.

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"That the said Jones on his own behalf, and the clerk on behalf of the said George Harper, should make entries of moneys received on account of the said partnership.

"That the said partners respectively shall be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings.

"That, in the event of the death of one of the partners, the managing clerk, after deducting expenses, should pay the debts when recovered to the surviving partner and the executors of the partner deceased.

"Lastly, each of them the said George Harper and R. P. Jones did thereby bind himself, his heirs, executors, and administrators, unto the other of them, his executors, administrators, and assigns (1), in the penal sum of 5,000*l.* of lawful money of Great Britain, for the due performance of all and every the covenants, articles, and agreements hereinbefore contained, which by them respectively are and ought to be observed, performed, and kept, according to the true intent and meaning of these presents."

Harper and the defendant Jones continued to carry on the business of solicitors until the partnership was terminated by the death of Harper on the 26th of September, 1851. By his will he appointed his partner Jones his executor.

The bill was shortly after filed to administer Harper's estate, and the cause came on for hearing. On the 30th of *May, 1853, an account was directed (*inter alia*) of what was due from the testator's estate in respect of specialty debts. Also of what was due to or from the testator's estate from or to the defendant Jones in respect of the partnership.

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The chief clerk certified, that, on taking the accounts, the debts due from the partnership amounted to 10,283*l.* 17*s.* 9*d.*, and the partnership assets were only 6,517*l.* 17*s.* 11*d.*, leaving a deficiency of 3,715*l.* 19*s.* 10*d.*; that Mr. Harper had received the sum of 14,207*l.* beyond the sums paid by him to the partnership account; and that the defendant Jones was in advance in a sum of 2,065*l.* 8*s.* 3*d.*

The chief clerk further certified, that, after making certain deductions, Mr. Jones was a creditor on the assets to the extent of 11,064*l.* 10*s.* 5*d.*, and that, as to the sum of 5,000*l.*, he was a specialty creditor; and, as to the balance of 6,064*l.* 10*s.* 5*d.*, he was a simple contract creditor against the estate of Harper.

(1) *Sic* in original.

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r.
JONES.

The case now came on, on two motions, one by the defendant Jones, objecting that the chief clerk ought to have allowed the whole debt as specialty. The cross motion was by the plaintiff, who contended that the chief clerk had improperly allowed any part of the debt as specialty.

Mr. Wigram and *Mr. C. Hall*, on behalf of the defendant Jones :

The defendant Jones, as executor of Harper, is entitled to retain the amount of damages sustained by a breach of covenant: *Loane v. Casey* (1). * * *

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Mr. Malins and *Mr. Kenyon*, for the plaintiff, contended that the certificate of the chief clerk was erroneous, in treating any part of the debt due from Mr. Harper as a specialty debt. * * *

His Honour said, he felt no doubt, that, as to 5,000*l.*, Jones was a specialty creditor ; but, as to the residue of the debt, he reserved his judgment, which he subsequently delivered on the 10th of June.

THE VICE-CHANCELLOR :

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The testator carried on business in partnership with Mr. Richard Parry Jones ; and the chief clerk has certified that there is due from the testator's estate to Mr. Parry Jones in respect of the partnership a balance of 11,644*l.* 10*s.* 5*d.* ; and that 5,000*l.*, part of this balance, is a specialty debt, by *virtue of the articles of partnership. It has been contended, on behalf of Mr. Jones, that the whole amount of the balance ought to have been certified to be a debt by specialty. On the other hand, it has been contended that no part of the debt is due on specialty ; not even the 5,000*l.* The partnership articles are under seal ; Mr. Jones, therefore, insists that the balance on the adjustment of the partnership accounts, that is, his proportion of the residue on the balance of the accounts, is due to him by virtue of transactions arising on an obligation under seal, and ought, therefore, to be admitted to proof as a specialty debt.

The partnership articles contain no covenant by either partner for payment of the balance due on any settlement of the partnership accounts. There are stipulations, that they are to be interested in equal shares in the capital and profits ; that, if either shall be in advance for the partnership to an amount exceeding what shall

have been advanced or paid by the other, he shall be entitled to repayment, with interest at 5*l.* per cent. per annum, before any division of profits; that they will be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings. And at the end of the deed there is an obligation in the form of a bond, by which they are bound to each other in the penal sum of 5,000*l.* for the due performance of all and every the covenants, articles, and agreements therein contained.

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There being no express covenant for the payment of the balance on adjusting the partnership accounts, the right to that balance arises from the relation constituted by the articles of partnership. One of the consequences of the relation of partners constituted by deed under seal is, that neither of the contracting partners can bring an action against the other. It is said, however, that the deed which creates this incapacity to sue at law constitutes a specialty debt for the general balance on the result of the partnership accounts. None of the cases *cited at the Bar support this view—and it would be a strange thing if they did. The right to recover the balance due on the result of the partnership accounts accrues under the equity, which was said by Lord ELDON, in the case of *Paynter v. Houston* (1), to make the executor of a deceased partner an equitable creditor or debtor to the surviving partner. This equity arises from the relation of partner, and not from express obligation. The mere fact that the relation arises from a contract under seal to constitute that relation, seems something short of what is required to make a debt by specialty.

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Unless the deed expressly binds the debtor to payment by containing an express obligation to pay it, it does not constitute a debt. These articles, however, do constitute the relation of debtor and creditor expressly, and for an amount exactly defined. Whether that amount might or might not be the sum due to either upon the balance of accounts, the contract is express as a specialty debt for a definite sum.

This express contract as to the amount of debt under specialty excludes any implication by which that amount can be enlarged as a specialty debt. The payment of the general balance due on the partnership accounts is one of the duties for the due performance of which the obligation in the penal sum of 5,000*l.* is expressly contracted; and as that duty has not yet been performed towards Mr. Jones, and the balance due to him exceeds the amount

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stipulated by the bond, he has been rightly certified to be a creditor by speciality for that amount. But for so much as is due to him beyond the penal sum of 5,000*l.* it is recoverable merely as a general balance arising from the relation of partner, the payment of which is not secured by any express obligation under seal, and it therefore cannot be treated as a speciality debt.

1854.
March 4.
May 27.

COAPE v. ARNOLD.
ARNOLD v. COAPE.

(2 Sm. & G. 311—325; S. C. 18 Jur. 506; 2 W. R. 482.)

[Affirmed on appeal as reported in 4 D. M. & G. 574.]

1854.
May 10.

PYECROFT v. PYECROFT.

(2 Sm. & G. 326—328.)

Under the old practice the defendant's application to dissolve a common injunction (staying proceedings at law) would not be granted upon a mere general denial of the plaintiff's equity. The defendant must traverse by affidavit all the facts upon which the plaintiff's equity rested.

1854.
June 12.

BELLAMY v. HILL.

(2 Sm. & G. 328—331.)

Under a gift of residue in remainder to the testator's grandchildren then living and their children, the child or children of any grandchild to be entitled to the parent's share: Held, that on the death of a grandchild before the period of distribution, the children of that grandchild took vested interests not contingent upon their surviving the period of distribution.

[See *Martin v. Holgate* (1866) L. R. 1 H. L. 175, 35 L. J. Ch. 789.]

1854.
June 13.

KANE v. MAULE.
KANE v. REYNOLDS.

(2 Sm. & G. 331—334; S. C. 2 Eq. 672; 2 W. R. 541.)

[Affirmed on appeal as reported in 4 D. M. & G. 565.]

POWDRELL *v.* JONES.

(2 Sm. & G. 335—338; S. C. 23 L. T. O. S. 304.)

1854.
March 29.STUART,
V.-C.
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By a settlement made on his marriage, the settlor covenanted with trustees to settle estate A. upon his wife, but did not. He subsequently exchanged estate A. for estate B. and 1,050*l.*, and died insolvent. In a suit by a creditor to administer his estate, the COURT declared that estate B. and the 1,050*l.* ought to be taken in substitution for A.: Held, that the 1,050*l.* was a debt by specialty under the covenant.

THE testator, George Harper, by his marriage settlement, dated the 3rd of August, 1848, covenanted for himself, his heirs, and all necessary parties, within twenty-four months, to convey to the trustees, upon the trusts in the said indenture declared, a messuage and lands called Belvedere, of which he was seised in fee subject to a mortgage. The trusts contained in the deed were for the benefit of the husband and wife in that settlement, with certain provisions for raising a sum of 3,000*l.* on the settled property, with a view to pay off the annuity mortgage.

The marriage was solemnised shortly after the execution of the settlement, but Harper never settled Belvedere; but, by a memorandum of agreement, dated the 25th of June, 1852, he exchanged the Belvedere property, and a lease of a messuage called St. Mary's, with a Mr. Goodall, for a property called Mossfields and a sum of 1,050*l.* The messuage called St. Mary's was of the value of 82*l.*, the balance, 968*l.*, together with Mossfields, making up the value of the Belvedere property.

On the 15th of December, 1851, the first trustee of the settlement being desirous of retiring from the trust, the defendant Oswell was appointed trustee in his room.

On Harper's death, the bill was filed to administer his estate. On the 30th of May, 1853, the cause came on to the hearing, when his Honour declared the marriage settlement valid; and declared that the mansion house, with the lands and grounds thereto belonging, called Mossfields, situate at Dollington in the county of Salop, and the sum of 1,050*l.* received by the said George Harper in exchange for the said estate called Belvedere, in the said indenture of settlement mentioned, ought to be taken in substitution *for the said Belvedere estate; and that all the estate and interest of which the testator died seised in the said Mossfield estate be subject to the trusts of the said settlement.

And it was declared, that the defendant Edward Oswell, as trustee of the settlement, is entitled to come in and prove as a creditor of the said George Harper, deceased, for such sums or any

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as should or might be due or owing to him in respect of the said sum of 1,050*l.*, and interest thereon from the death of the said George Harper at the rate of 4*l.* per cent.; and that what should be recovered under such proof would be subject to the trusts of the said settlement.

The decree also directed the following inquiry :

“An account of what, if anything, was due to the defendant Edward Oswell, as trustee of the marriage settlement of the said testator in respect of the said sum of 1,050*l.*, and to all other the creditors by simple contract of the said testator.”

In taking the account in chambers, the chief clerk certified that he, Oswell, was a simple contract creditor for the sum of 968*l.* under the articles of settlement.

This was a motion on behalf of the trustee to vary that certificate.

Mr. Bacon and *Mr. H. Humphreys* appeared for the plaintiff.

Mr. Malins and *Mr. Kenyon* in support of the motion :

By the covenant Harper bound himself to settle a particular estate within a given period ; but, having failed to fulfil his engagement, the decree of the Court declared that Mossfields and the sum of 1,050*l.* should be taken in substitution. The correct view of the decree is not, that it created a new obligation, but that it brought within the operation of the existing covenant one part of the testator's estate in lieu of another. The effect is the same if Mossfields and *1,050*l.* were specified in the covenant in lieu of Belvedere. Here the covenant was for a specific thing and created a lien on the property which was the subject of it: *Fremoult v. Dedire* (1).

The cases of *Musson v. May* (2) and *Lomas v. Wright* (3), were also cited.

Mr. Wigram and *Mr. Charles Hall*, *contra* :

There never was any covenant to settle Mossfields or the sum of 1,050*l.* The only covenant on the part of the testator was to settle Belvedere, which covenant he had violated, and during his life his estate would have been liable to compensate for the breach of covenant by damages to be recovered in an action at law. This was no more than a claim for the difference between the value of

(1) 1 P. Wms. 428.
(2) 3 V. & B. 194.

(3) 39 R. R. 350 (2 My. & K. 769).

the two estates, which was clearly a debt by simple contract. In this case, moreover, the decree had determined the quality of the debt by treating it as a debt by simple contract.

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THE VICE-CHANCELLOR :

The only difficulty arises from the terms of the decree. The question is, whether the sum of 1,050*l.*, which is claimed against the estate of George Harper deceased, is a debt by specialty or simple contract. It certainly was either a debt under the covenant, or by simple contract against Harper's estate. It is said that the decree has stamped this debt with the character of a simple contract debt merely. I do not feel bound to take that view of the decree; for it specifically directs an account as to the 1,050*l.*, and the words "other creditors by simple contract" cannot alter the character of the 1,050*l.* if it be in fact a specialty debt. The decree of the Court has established, that, under the covenant to settle Belvedere, what has been done by Harper has made the covenant to settle Belvedere attach to *what was substituted for it, that is, Mossfields and the sum of 1,050*l.* But it is said, that the effect of the decree, by bringing by way of substitute the sum of 1,050*l.* within the operation of the covenant, makes it a specialty debt. On the other hand it is argued, that the only effect of the decree is merely to create a right by way of lien, and not otherwise, on Mossfields and the 1,050*l.* It is contended, that that sum having been received and spent by Harper, created an obligation only by way of simple contract against his estate.

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If it is admitted, that the effect of that part of the decree was to give a lien on Mossfields, such right could only arise by virtue of the covenant, which is a contract by specialty. If that be the effect of the decree as to the lien on Mossfields, what is the effect of it as to the 1,050*l.*? How can it be said, that the right accruing under the decree by substitution of Mossfields, is not to be pursued in the same way; because, if the 1,050*l.* by the operation of the decree is brought under the operation of the covenant, it is brought under the operation of what is an obligation by specialty

If Harper were alive, and this decree had been pronounced, declaring that Mossfields and the sum of 1,050*l.* were to be substituted for Belvedere, and he had after such a decree refused to convey Mossfields, and to pay the sum of 1,050*l.*, he would have been compelled to do so by the operation of the decree, founded upon the covenant. The only contract by Harper as to this settlement

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is the covenant, *i.e.*, a contract by specialty; and, therefore, the right under that obligation by specialty being established by the decree, I see no ground for holding, that, if there be a contract at all binding Harper's estate, it can be any other than that by his covenant under seal, and therefore a specialty debt.

1854.
July 1.

BEANLAND v. BRADLEY.

(2 Sm. & G. 339—343; S. C. 2 W. R. 602.)

STUART,
V.-C.
[339]

Where a person, aged 85, by a deed, a few days before his death, grants a benefit to his grandson and son-in-law, there is no such confidential relation as to induce this Court to presume fraud.

JAMES BEANLAND, by his will, gave part of his real and personal estate to his daughter Ann Bradley, his nephew George Beanland, and his friend Lester Hargreaves, upon certain trusts, for the benefit of James Beanland, the son of Ann Bradley.

The testator died on the 25th of August, 1852, and appointed Ann Bradley, George Beanland, and Lester Hargreaves, executrix and executors of his will. The bill, which was filed by the plaintiffs, who had purchased the share of Eliza Hall, one of the legatees under the will, contained *inter alia* the following allegations: "That, at the date of the agreement of the 12th of August, 1852, the testator was upwards of eighty-five years of age, and was deaf, and he had become and was much weakened and infirm, both in mind and body, and he was and had for some time been confined to and was unable to leave his bed, and he was not in a condition to exercise any valid disposition of his property. He had for a considerable time employed Messrs. Bentley and Wood, of Bradford, as his solicitors, and at the time he executed the agreement was not in the habit of executing any instrument of importance without first consulting them.

"The defendant Ann Bradley had long lived with the testator at Shipley, and was acting as his housekeeper at the date of the agreement; and from the infirm state of his body and mind she had a great influence over him. The defendant John Bradley, at the date of the said agreement, lived with the testator.

"Under the testator's estate of Firth Carr, containing three acres, was valuable fire clay and brick; and shortly before his death John Bradley and James Hall formed a design of obtaining from the testator, at a rent very much *below the real value, a lease of the same; and the defendant Ann Bradley agreed to assist

them in carrying out their design ; and accordingly one of them prepared an agreement only thirteen days before the testator's death, and they came to the said testator, who was then in his bed, and they alleged, that he the said testator subscribed the said agreement, and his signature appears to be subscribed to the said agreement ; but, in fact, the said testator was not then able to sign and did not sign the same. The agreement purported to be sealed by the parties thereto, but is not sealed."

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The lease was : " An agreement made the 12th day of August, 1852, between James Beanland, of Shipley, in the parish of Bradford, in the county of York, gentleman, of the one part, and John Bradley and James Hall, of Shipley, parish of Bradford and county of York, of the other part. The said James Beanland, for the consideration hereinafter mentioned, doth hereby let unto the said John Bradley and James Hall all the fire clay and common brick clay situated and being in the township of Heaton and parish of Bradford in the county of York, in the land known by the name of Firth Carr, at the yearly rent of 20*l*. The aforesaid John Bradley and James Hall to have all the clay they can get in the aforesaid land at the above yearly rent ; and the said John Bradley and James Hall to have the privilege of getting and making the same into brick, &c., to the best advantage, with paying reasonable damage for the same ; the time for getting the clay to be eleven years. The lease to be renewed, if required, by the said John Bradley and James Hall, and to pay during the said term unto the said James Beanland, his heirs or assigns, &c. &c., and the said rent or sum to be paid by equal quarterly payments at the several times hereinafter mentioned ; the first of such payments to be made on the first day of September, the first day of December, the first day of March, and on the first day of June in each year. And *it is further agreed that the said John Bradley and James Hall, at their pleasure, at all times during the said term of years herebefore granted, into and upon the said land or parcel of land, or any part thereof, to enter, and therein to make, dig, sink, drive, and erect, and to have, use, and enjoy all such roads, soughs, and other works as shall be necessary for the purpose of getting, working, laying up, carrying away, and manufacturing clay into bricks, tiles, &c. &c., or to sell the said clay in its raw state. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first herein written."

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John Bradley was the husband of the testator's daughter, Ann

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Bradley, and James Hall was the son of Eliza Hall, another of the testator's daughters.

It was proved by the evidence that the testator at the date of the agreement was in a state of bodily weakness, but there was no evidence to show that his mind was affected.

It was proved that the rent reserved was much below the real value of the estate. There was no evidence to show any undue influence by Ann Bradley or the parties to the lease.

It was proved, on the part of the defendants, that the testator had on previous occasions granted leases without the intervention of a solicitor.

Mr. Elmsley and Mr. G. L. Russell for the plaintiff :

The principle upon which this Court sets aside a benefit unfairly obtained, is not confined to cases between trustee and cestui que trust, or between guardian and ward. On the contrary, it is extended to every case where confidence is reposed in a person, who, from his position or the circumstances in which he stands, is possessed of influence over another, and abuses it for his own advantage: *Cooke v. *Lamotte* (1), *Hoghton v. Hoghton* (2), *Billage v. Southee* (3).

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In this case it is proved, that Ann Bradley was possessed of great influence over the testator; that he was much dependent upon her in consequence of the infirm state of his health; that, just eight days before his death, without the intervention of a solicitor, he signed the agreement which had been previously prepared by the defendants, and by which the most valuable part of his property, viz. the clay for fire clay and brick, was transferred to John Bradley and James Hall for a totally inadequate rent. It was contended, that these circumstances were sufficient to induce a court of equity to presume fraud and to annul the transaction.

Mr. Bacon and *Mr. Pearson* appeared for John Bradley and Ann Bradley, and *Mr. Ellis* for James Hall, but were not called on by his Honour.

Mr. Pemberton appeared for the testator's heir-at-law.

THE VICE-CHANCELLOR :

The bill seeks to set aside a lease of the Firth Carr estate.

- (1) 92 R. R. 397 (15 Beav. 234).
(2) 92 R. R. 421 (15 Beav. 278).

- (3) 89 R. R. 564 (9 Hare, 534).

The bill alleges, that, when the lease was executed by the testator, he was confined to his bed; that Ann Bradley had acquired much influence over him, and that he was induced by her to execute this lease just eight days before his decease, and without professional advice, in favour of his grandson and his son-in-law, the husband of Ann Bradley. If the allegations of undue influence and surprise had been proved, there would be no difficulty in granting the relief *sought by this bill; but the plaintiff fails in proof of what is the foundation of his case—the undue influence and surprise.

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It is said, that the lessor, being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit, as to throw upon them the *onus* of proving the absence of undue influence. It is a new doctrine, that a parent cannot by a deed, only a few days before his death, benefit a child or grandchild. The case which has been cited in support of it, *Hoghton v. Hoghton* (1), is very different. That was a case in which a son, having just attained twenty-one, gave up property for the benefit of his father, who was his natural guardian, and was therefore within that rule of this Court which protects a person under the influence of others from having that influence abused. There is, however, no rule of this Court which prohibits a man by a voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and, where a father discharges that duty, this Court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way. In this case no fraud has been shown, and I must, therefore, dismiss the bill, so far as it seeks to have the lease set aside.

(1) 92 R. R. 421 (15 Beav. 278).

1854.
July 5.

STUART,
V.-C.

[344.]

NEWHOUSE *v.* SMITH.

(2 Sm. & G. 344—351 ; S. C. 2 W. R. 618.)

Devisee in tail of real estate, claiming to be exonerated out of the descended moiety from a mortgage, filed his bill against the heir more than thirty years after testator's death, and more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained under a decree of the COURT: Held, that the devisee was entitled to a decree for exoneration against the heir, with costs.

THIS bill was filed by Charlotte Susan Newhouse, for the purpose of obtaining a declaration from the Court, that she is entitled to have a moiety of certain real estate, devised to her by the will of Nicholas Turner, exonerated from the several sums of 1,500*l.*, 500*l.*, and 1,500*l.*, with interest due thereon, out of the other moiety of his real estate which descended to her coheirs.

The Rev. Nicholas Turner, the testator in the cause, being seised of an undivided moiety in certain freehold land, with thirteen messuages and other buildings thereon, situate in the parish of St. Martin in the Fields, by deeds, dated the 28th and 29th of June, 1811, mortgaged the same in fee (with a proviso for redemption) to John Neale, to receive 1,500*l.*, with interest at 5*l.* per cent.

The amount was further secured by a bond of the same date for the like amount. By an indenture of the 29th of May, 1813, the same premises were charged with a further sum of 500*l.* advanced by John Neale to the testator. By indentures of lease and release, dated the 17th and 18th of August, 1819, the same premises were mortgaged by the testator to George Barrett and Thomas Mellersh, to secure a sum of 1,500*l.* with interest at 5*l.* per cent.

The testator, Nicholas Turner, by his will, dated the 25th of March, 1816, directed all his just debts, funeral and testamentary expenses to be paid by his executors thereafter named, as soon as conveniently could be after his decease; and with the same, and the payment thereof, he thereby charged all his real and personal estate; and he gave and bequeathed all his goods, chattels, rights, credits, money, securities for money, personal estate and effects, which he might be possessed of or interested in at the time of his decease to his wife Sarah Turner and Nicholas Turner, *a captain in the Royal Artillery Drivers, (in the said testator's will called his son, and hereinafter called Nicholas Turner the son), equally to be divided between them, share and share alike; and the said

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testator thereby gave and devised all his messuages, lands, hereditaments, and real estate whatsoever, including his moieties or other parts or shares in the said thirteen houses in Coventry Street, Oxenden Street, and Great Whitcomb Street aforesaid, unto and to the use of the Rev. Francis Whitcomb, clerk, and the Rev. Joseph Francis Fearon, clerk, and their heirs, upon trust, from time to time, to receive the rents and profits of the said hereditaments, and to pay and apply the same as follows: *Videlicet*, to pay to his the said testator's wife, the said Sarah Turner, two full and equal third parts of the said rents and profits during the term of her natural life, and to pay the remaining third part of the said rents and profits unto the said Nicholas Turner the son, during the life of his the said testator's wife; and after his decease upon trust for and to convey the same and every part thereof unto the said Nicholas Turner the son, and his heirs, for ever; but, in case the said Nicholas Turner the son should die in the lifetime of the said testator's wife, then upon trust to pay to Mary, the wife of the said Nicholas Turner the son, one full equal third part of the said rents and profits, for the term of [her] natural life; and after the death of his the said testator's wife Sarah, if the said Nicholas Turner the son should be then deceased, but not otherwise, then as to the whole of his the said testator's said messuages, hereditaments, or other real estates before therein given, subject, nevertheless, and without prejudice, to the payment to the said Mary Turner of the said one-third part of the rents, issues, and profits thereof, upon trust for the heirs of the body of the said Nicholas Turner the son, for ever; and, in default of such issue, upon trust for the benefit of the plaintiff Charlotte Susan Newhouse and Elizabeth Odell (now deceased), equally to be divided between or amongst them, *share and share alike, as tenants in common, and not as joint tenants, and for the heirs of their respective bodies lawfully issuing; but, in case either of them the said Charlotte Susan Newhouse and Elizabeth Odell should depart this life under the age of twenty-one years, without leaving lawful issue, then in trust for the survivor of them, and the heirs of her body lawfully issuing.

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The testator, by a codicil, dated the 29th of July, 1817, revoked the devise to Francis Whitcomb and Joseph Francis Fearon, and devised the said estates to the use of Francis Whitcomb and William Milton Bridger on the trusts in the will, and also appointed them executors.

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The testator died on the 19th of December, 1819, leaving no lawful issue. Catherine Ann Dorset, the daughter, and William Toners Smith, the eldest son of Charlotte Smith, the testator's deceased sister, were his co-heirs-at-law.

Nicholas Turner, the son, died without issue in February, 1826; and his widow died on the 12th of November, 1835. Elizabeth Odell died in 1827, having attained the age of twenty-one, but without having done any act to bar the estate tail created by the testator's will; and on her death one moiety of the testator's real estate, subject to the mortgage debts, and subject to the subsisting life estate and interests in Sarah Turner and Mary Turner, descended to the co-heirs of the testator. Sarah Turner died on the 26th of January, 1827, and, by a deed, dated the 4th of February, 1837, the plaintiff, the devisee under the testator's will, barred the estate tail, as to her moiety created by the testator's will.

In April, 1849, the Rev. T. G. Calhoun filed a bill on behalf of himself and all other the creditors of the testator, in which Master Horne, by his report, dated the 26th of July, 1851, found, *inter alia*, that, except the debt of the plaintiff in that suit for 280*l.* and the mortgages, there were no debts of the testator; and that the whole of the testator's estate undisposed of amounted to 2,698*l.* 5*s.* 8*d.*; *which, after deducting costs, was decreed to be carried to the account of the personal representatives of Nicholas Turner, deceased.

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On the 26th of March, 1852, the suit of *Smith v. Bridger* was instituted by an incumbrancer against W. M. Bridger, the executor of the testator, in which it appeared that the personal estate was insufficient to pay the simple contract and specialty debts. The suit came to a hearing on the 29th of July, 1854.

On the 19th of August, 1853, the mortgagees filed their bill to foreclose the mortgage. Upon which the devisee, the personality being insufficient to pay off the mortgage, interest, and costs, filed this bill, as devisee of the moiety of the real estate, claiming to have the devised moiety exonerated out of the descended assets. She had for four years paid the interest on the mortgages. The defendant, in her answer, claimed the benefit of the Statute of Limitations.

Mr. Elmsley and Mr. Welford for the plaintiff [cited *Galton v. Hancock* (1).]

Mr. Malins and Mr. Macnaghten for the co-heirs :

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This is in effect an adverse claim against the descended moiety of the testator's real estate, and cannot be sustained after twenty years from the time the right accrued. The testator died in 1819, and on his death the plaintiff ought to have applied to have the devised moiety exonerated from the mortgage. [They cited *Fordham v. Wallis* (1), *Harrison v. Duignan* (2), *Piggott v. Jefferson* (3), and *Derbishire v. Home* (4).]

Mr. Bacon and Mr. Dickinson for the devisees of the co-heirs :

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Suppose the plaintiff were mortgagee in possession, the equity of redemption would be barred by the statute. How then can she be in a better position?

THE VICE-CHANCELLOR:

I am disposed to allow the plaintiff's claim as to payments from the filing of the bill; but, if the plaintiff presses for more, I must hear the reply.

Mr. Elmsley, in reply :

The plaintiff only claims to be allowed the payments for four years from the filing of the bill, and is clearly entitled to that extent. It cannot be said, that her payments were voluntary, because they are necessary to prevent the mortgage being foreclosed.

THE VICE-CHANCELLOR:

The arguments of the defendant's counsel have failed to remove the impression which I entertain in favour of the *plaintiff's case. The authorities which have been cited do not affect the right to the relief asked by this bill.

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It is acknowledged, and, indeed, could not be disputed, that originally the plaintiff had the right to compel exoneration. But the defence relied on is the length of time. At the death of the testator, in 1819, his real estate was subject to several mortgages. There can be no doubt at that time the devisee was entitled to have the personal estate applied in payment of the mortgage, in exoneration of the devised estate; and, in the event of the said

(1) 90 R. R. 344 (10 Hare, 217).

(4) 3 D. M. & G. 80, to be reproduced

(2) 59 R. R. 689 (2 Dr. & War. 295). in 98 R. R.

(3) 56 R. R. 1 (12 Sim. 26).

NEWHOUSE personal estate proving insufficient, to have had the descended
v. estates resorted to for the same purposes.
SMITH.

It is contended, however, that the plaintiff was bound to have enforced her right in 1819, at the testator's death, or at least in 1827, when, upon the death of Elizabeth Odell without issue, the defendant took by descent. But the answer to that argument is, that, until the personal estate was administered, it was impossible to say whether it would be necessary for the plaintiff in this suit to have recourse to the real assets at all; and it is certain that it was not until after 1849, that the state of the testator's assets had been definitely ascertained. Under these circumstances, I do not think the Statute of Limitations, which the defendants have insisted on, affords any valid defence. The plaintiff is entitled to the declaration sought by this bill, and to have her costs of suit also raised and paid out of the descended moiety.

I think, however, the plaintiffs are only entitled to an account of the rents from the date of the filing of the bill.

1854.
June 13.

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JAMES v. LORD WYNFORD.

(2 Sm. & G. 350—352; S. C. 23 L. J. Ch. 767; 18 Jur. 868; 2 W. R. 607;
23 L. T. O. S. 320.)

A testator, having a vested estate under the will of his grandfather, subject to a life estate in his grandfather's daughter Mary, excepted from the operation of his will the real and personal estate which he might derive from his aunt Mary or any of her family: Held, a sufficient description of his vested interest under his grandfather's will.

ROBERT TAYLOR, by his will, devised certain estates at Crewkerne, to trustees, upon trust for his daughter Mary Ann Taylor for her natural life, and from and after her decease, upon trust to receive and pay the rents and profits for the benefit of all and every the son and sons of her daughter whom she might leave behind her for their maintenance, until he or they should attain the age of twenty-one years; but in case his said daughter should leave no son or sons, then followed a like trust for her daughter; but, in case his said daughter Mary Ann should happen to die leaving no child or children, the testator willed that the trustees should apply the rents and profits for the benefit of his daughter Bridget, for the term of her natural life; and from and after her decease, in trust to pay the same for the benefit of his daughter Bridget's son Robert T. S. Abraham, and all and every son or sons she should happen to have, until he or they should attain the age of twenty-

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five years; and on his or their attaining that age, in trust for the heirs, executors, and assigns of the said Robert and other sons whom his said daughter should leave, and who should attain the age of twenty-five years &c. ; with a gift over.

By the decree of the 1st of December, 1852 (1), his Honour declared, that the gift in remainder to Robert was vested; and as he was the only son of Bridget, and lived to attain twenty-five, his estate and interest became indefeasible.

During the life of Mary Ann Taylor, who survived him, Robert T. S. Abraham made his will, dated the 24th of September, 1842, by which, having directed his debts and funeral and testamentary expenses to be paid out of his personal *estate, so as not to affect two annuities of 84*l.* and 56*l.* therein mentioned, nor the personalty which he might derive from his aunt the said Mary Ann Taylor; and appointed Thomas King and Francis Falkner joint executors of his will, and appointed his widow Rachel Abraham, during her widowhood only, and the said Thomas King and Francis Falkner guardians of the person and property of his daughter Mary Ann Taylor Abraham; and after giving certain specific pecuniary legacies, which he directed to be paid out of his personal estate, except the said annuities and the personal estate he might derive from his said aunt, he gave, devised, and bequeathed unto the said Thomas King and Francis Falkner, their heirs, executors, &c., the freehold house in which he resided, and his other freehold and leasehold property in Bath, and his estate in the parish of Clevedon, and the said two annuities, and all Long and Consolidated Three per cent. Annuities standing in his name at the date of his will, and his household furniture and effects, money in his banker's hands, and all other his real and personal estate; and directed, that all the before-mentioned real and personal estate should, for the purposes of his will, be considered as personal estate, except the real and personal estate he might derive from his said aunt, the said Mary Ann Taylor, or any of her family, to hold the same to the said trustees, upon trust, to pay the annual income into the hands of his wife Rachel for her separate use for life, and after her decease in trust for her daughter Mary Ann Taylor Abraham.

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The testator died on the 28th of November, 1843, leaving Mary Ann Taylor Abraham him surviving, and an infant then *en ventre sa mère*.

Mary Ann Taylor died in 1848, never having been married.

(1) See the case reported 96 R. R. 308 (1 Sm. & G. 40).

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Rachel Abraham, the widow of the testator, presented this petition, claiming to be entitled to a life estate in the Crewkerne estate.

Mr. Elmsley and Mr. Karlake for the petitioner :

At the date of the will the testator had a vested interest in the estates ; he could not, therefore, describe such estate as the real estate which he might derive from his aunt Mary. It was clear, therefore, on this ground, that that property was not excepted. Secondly, the words “from any of the family of my aunt” meant, in the ordinary sense, the children or grandchildren of his aunt, and could not by any reasonable intendment refer to her father. If the Court should adopt either of these views, the petitioner would be entitled to a life interest in the property.

Mr. Malins, Mr. Walter, Mr. Collins, Mr. G. M. Giffard, Mr. Bates, and Mr. C. M. Roupel, appeared for other parties.

THE VICE-CHANCELLOR :

The question depends on the meaning of the words of exception. It has been argued, that the words “except the real and personal estate which I may derive from my aunt or any of her family,” being words *de futuro*, cannot be construed as extending to an estate of which the testator at the date of his death was seised as a remainder in fee. I cannot take that view, because I think a vested remainder, to which he was entitled under the will of his aunt’s brother, might naturally be spoken of as an estate which he might derive from one of the aunt’s family.

Then, it has been contended, that the words “any of her family” could only mean her children. I have no authority for putting such a limited meaning on these words. I think the father of the testator’s aunt was one of the family in the sense in which the words seem to have been employed. I am of opinion, therefore, that the petitioner is not entitled to the declaration asked by his petition.

WICKHAM v. GATRILL (1).

(2 Sm. & G. 353—360 ; S. C. 23 L. J. Ch. 783 ; 18 Jur. 768 ; 2 W. R. 673 ; 23 L. T. O. S. 252.)

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A person who has been defrauded by a felony may seek civil redress where prosecution has become impossible by the death of the offender.

THIS was a general demurrer to the plaintiffs’ bill for want of equity.

(1) *Ex parte Ball* (1879) 10 Ch. D. 661, 48 L. J. Bk. 57, 40 L. T. 141.

The bill alleged in substance as follows :

First—The plaintiffs carried on as business as bankers, &c.

Secondly—In 1838, James Rudge Gatrill, deceased, was engaged as managing clerk to the plaintiffs, and continued in their employ as such managing clerk, until the 3rd of May, 1854, when he absented himself, being very ill and unable to leave his bed. He died on the 6th of May, intestate, leaving the defendant Hannah Gatrill his widow, and James Matcham Gatrill, his eldest son and heir-at-law, seised and possessed of real and personal estate of considerable value.

Thirdly—While employed in the banking business, the intestate acted as agent and sole clerk in the firm, and declined to have an assistant, and was in the constant habit of receiving and constantly received on behalf of the plaintiffs considerable sums of money, and was the only person who kept the books. In consequence of the confidence the plaintiffs reposed in him, and from his long service, they did not in his lifetime strictly scrutinise and examine the said books kept by him, as they otherwise would have done; and, down to his death, no true account of the monies received by him, and of his transactions on their behalf as such clerk, was obtained. On the plaintiffs, on the decease of the said intestate, investigating the books, it appeared, as the fact is, that he had appropriated considerable sums of the plaintiffs' money to his own use, and had never accounted for the same, but made from time to time false and fictitious entries in the said books, for the purpose of concealing his fraudulent misappropriation of the monies received by him at the date of his death. There was a very large sum, amounting to several thousand pounds, due to the plaintiffs, and the same is now due, and there is due also 300*l.* and upwards on his account, which he had overdrawn.

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The fourth allegation was immaterial.

Fifthly—Immediately on the death of the intestate, the defendant Hannah Gatrill sent for the plaintiff Charles Bailey, who is a solicitor, in order to place in his hands the documents &c. &c. belonging to the insolvent, with a view to obtaining letters of administration; on which the plaintiff inquired what was in the house? She replied 1,000*l.* The plaintiff then told her the amount required for administration. On the day of the intestate's death, one of the plaintiffs, Charles Bailey, told the defendant J. M. Gatrill, as the fact was, that he apprehended there had been serious defalcations and frauds committed against the firm; and

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on the evening of the funeral, the plaintiff waited on Hannah Gatrill, by the appointment of J. M. Gatrill, and requested her to bring him all the money and documents in the house for the purpose of inspecting them; upon which she went upstairs, and returned with 1,595*l.* in notes and gold, also various securities, title-deeds, and documents of large value. The plaintiff then told her of the defalcations and fraud committed by the intestate; and, on expressing his surprise at the amount found in his house, Hannah Gatrill stated she had often said to the intestate that she thought he did not come by it honestly, and had often told him so when he brought money home of an evening. The 1,595*l.* and the securities were then delivered to the plaintiff. A search was made in the drawers and desks in the banking-house of which the intestate had the keys, and mining-shares, bills of exchange, promissory notes, and other effects, to a considerable amount, were discovered and taken possession of by the plaintiff, as he considered he had a lien thereon, and it was also necessary that the value should be ascertained for administration.

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Sixthly—Hannah Gatrill then instructed the plaintiff to *take the necessary steps for administration of the intestate's estate, and a commission was applied for and sent to Winchester. It was afterwards delayed at the desire of Hannah Gatrill, in order that she might consult her brother and brother-in-law; but, the plaintiffs being alarmed at the large amount due from the intestate, and to secure the application of his estate towards payment of their debt, Charles Bailey obtained from Hannah Gatrill, in May, 1854, the following memorandum:

“Mrs. Gatrill to give to Mr. J. Wickham, jun., a power of attorney to transact all affairs connected with the administration of the effects of her late husband, and to receive and pay all monies due to or owing from the estate, and to stand possessed of the estate, in trust to pay all debts and sums of money due from him to Wickham & Co. and other parties, and to stand possessed of the residue, in trust to pay over the same to Mrs. Gatrill. Mr. J. M. Gatrill to execute a power of attorney, authorising Mr. J. Wickham, junior, to stand possessed, and to sell and dispose of the freeholds upon the same trusts. Mr. J. Wickham, junior, to covenant that he will perform the above trusts, and, at the expense of the estate, show to Mrs. Gatrill, in any way she may choose, how the debts have become due. In consideration of the sums of money

due from the late Mr. J. R. Gatrill, to Messrs. Wickham & Co., we undertake to carry out the above terms.

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“Dated 15th May, 1854.

“HANNAH GATRILL.

“JAMES MARKHAM GATRILL.”

Seventhly—That, on the signature of the above, Charles Bailey returned to Hannah Gatrill 100*l.*, leaving 1,495*l.* in the plaintiffs' hands. Soon after, Mr. J. B. May called on the plaintiff Charles Bailey, stating that he was retained by Mrs. Gatrill, and delivered the following document :

“MR. CHARLES BAILEY—Be good enough to give up to Mr. Bowen May all papers, money, and property you have of *mine, or of my late husband, as Mr. B. May is appointed to act for me as my solicitor.

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“22nd May, 1854.

“HANNAH GATRILL.”

No letters of administration had been then granted to her, and the plaintiff, having regard to the circumstances aforesaid, and to the large amount due to the plaintiffs, declined to give up the money and securities, and a correspondence took place between the solicitors.

Eighthly—The defendant Hannah Gatrill claimed to be legal personal representative of the intestate, by virtue of letters of administration she had taken out, and has commenced proceedings in the Court of Queen's Bench by rule *nisi* to compel the delivery up of the deeds and securities, and has threatened to commence other proceedings ; but, under the circumstances, the plaintiffs are desirous the intestate's estate should be administered in this Court ; and submit whether they have not a lien on the money, deeds, and documents ; yet they are ready to pay the 1,495*l.* into Court in trust in this cause, and to deposit the deeds &c.

Ninthly—The plaintiffs are willing and have offered to have the matter amicably settled without resorting to law, and to have the money and deeds deposited with trustees, &c., but the defendants have refused, &c.

Tenthly—The defendants have divers deeds, documents, &c. &c.

The bill therefore prayed—

1. An account of what is due to the plaintiffs and other creditors.
2. The usual accounts of the personal and real estates.
3. That the estate may be applied in payment of what is due to the plaintiffs and other creditors.

4. That the defendants may be restrained from proceeding at

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law against the plaintiffs in respect of the said money, securities, deeds, and documents, the plaintiffs, and particularly the plaintiff Charles Bailey, to pay the money into Court, and to deposit in Court the deeds, documents, &c. &c.

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5. That a receiver may be appointed.

6. That proper inquiries may be made and directions given, and provision made for the costs.

7. That the plaintiffs may have such further relief, &c. &c. &c.

Mr. Elmsley and Mr. J. V. Prior for the demurring defendants, [cited *Cox v. Paxton* (1)].

Mr. Malins and Mr. J. H. Palmer for the bill, [cited *Stone v. Marsh* (2)]:

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Public policy required that offenders should be brought to justice; and for that reason a man was not permitted to abstain from the prosecution of the felony by receiving back the property or compounding the felony without suit, and of course could not maintain a suit for the same purpose. That this was the origin of the rule was obvious from the fact, that, after conviction, an action was maintainable: *Crosby v. Leng* (3), *Marsh v. Keating* (4), *White v. Spettigue* (5).

THE VICE-CHANCELLOR:

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The bill is filed by bankers against the legal personal representative of one of their clerks, who, as the bill alleges, misappropriated their monies to his own use, and concealed that transaction by false entries in the books. The ground of the demurrer is, that, so far as the debt *created by the misappropriation was a case of felony, being a case of felony, it cannot be made a ground of this suit. The bill is filed against the legal personal representative. The rule of law, that a felon cannot be sued upon a civil action in respect of a transaction which amounts to felony, is a rule of public policy. The reason of the rule is, that persons who have been defrauded by felonious acts should do their duty to the public by prosecuting for the felony before they seek redress for the private injury to themselves in a civil Court. That being the foundation of this rule, it has been said again and again, and was laid down distinctly, by Lord TENTERDEN in *Stone v.*

(1) 11 R. B. 95 (17 Ves. 329).

(2) 30 R. B. 420 (6 B. & C. 564).

(3) 11 R. B. 437 (12 East, 409).

(4) 37 R. B. 75 (1 Bing. N. C. 198).

(5) 67 R. B. 753 (13 M. & W. 603).

Marsh (1), that, where public policy ceases to require its operation, the rule ceases to operate also. It was said by the Judges in the House of Lords in the case of *Marsh v. Keating* (2), that, where criminal proceedings have been instituted in respect of a felonious act, and a civil remedy is sought, the civil right is suspended until justice is satisfied by a prosecution for the felony.

In the present case, the clerk, who committed the act which is said to be felonious, died before the felony was discovered, and the operation of the rule of public policy never was required. The object of the rule being to compel a prosecution for felony before any civil remedy could be sought, this became in the present case impossible, because the felony was not discovered in time to make the prosecution possible.

It would be strange, indeed, if such a defence could prevail in this Court. The assets of this unfortunate person are now in the hands of these defendants. The plaintiffs seek to recover by a civil remedy in this Court the amount in which the clerk died indebted to them in respect of this misappropriation. His assets to a large amount being now in the hands of his representative, it has *been gravely argued before me, that, because the act of misconduct which created the debt amounts to what the law calls felony, although not discovered till after his death, yet that the assets should be retained to answer all other demands except the just demands of these bankers. The rule of public policy does not apply to such cases, and I am very glad that it does not. I must, therefore, overrule this demurrer, and overrule it with costs.

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BOWDEN v. HENDERSON.

(2 Sm. & G. 360—367.)

The presumption of death, after seven years absence, does not arise, where the probability of intelligence is rebutted by circumstances.

MARTHA JUDD, by her will, dated the 3rd of May, 1834, bequeathed *inter alia* the sum of 1,700*l.* to her sister, Sarah Walker, for life; and after her decease she directed that the dividends should be paid to Joseph Langton the elder and Martha his wife for life; and after the decease of the survivor of them, in trust for all and every the five other children of the said Joseph Langton and Martha his wife, viz. Joseph Langton, Martha Dorville, Letitia Langton, and

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(1) 30 B. R. p. 430 (6 B. & C. p. 564). (2) 37 B. R. p. 103 (2 Cl. & Fin. p. 286).

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the defendants Laura Dyson and Charles Langton, in equal shares and proportions.

The testatrix bequeathed the residue of her personal estate to Sarah Walker.

The testatrix died on the 15th of June, 1839. Sarah Walker died on the 27th of December, 1843, having made a will, under which the plaintiff became her sole legal personal representative, and now claimed the one-fifth share in the 1,700*l.* stock given by the will of Martha Judd to Letitia Langton, as part of the residue of Martha Judd's estate, on the ground that Letitia Langton must be presumed to have pre-deceased Martha Judd.

[*361] The bill stated, that, in 1828 or 1829, Letitia Louisa Langton parted from her family, and left England for France, under the assumed name in her passport of Letitia Lonsdale. She at first resided at Calais, with a Miss Polhill. *In 1830 or 1831, she went to Paris, where she took a situation as governess in the family of the Comtesse de Couessen, who resided partly in Paris and partly at Neuvy. Some time between 1831 and 1835, she left that situation to reside with a Miss Anglade in Paris, and subsequently became governess in the family of the Baronne de Combertin, Rue St. Lazare, 88, Chaussee d'Antin, Paris.

[363] [The original report here sets forth copies of some undated letters from Letitia Langton to her sister Martha Dorville and to a Miss Caroline Langton, whose relationship to Letitia Langton is not stated. The last letter to Martha Dorville, which was apparently written in the early part of February, 1835, from Rue St. Lazare, 88, contained the following passage:] "I am sure you will be surprised to hear I am become a Catholic; it is a subject too long to enter upon."

[364] [The last letter written by Letitia Langton to Miss Caroline Langton, which was undated, but evidently written about the same time as the last letter to Mrs. Dorville, bore the post-office stamp of the 13th February, 1835, and contained the following passage:] "Where I am I have charge of a young girl fifteen years and a half old, who I can never leave for an instant. I have a situation in view, which appears highly advantageous; it is for a widower (1), who has a daughter eight years old. I should not have accepted it, of course, if his sister did not live in the house. He lives six months in Paris and six months in Normandy. He wishes me to

(1) The letter to Mrs. Dorville states his address as: Monar. de Bonbutier, No. 3, Rue Ventadour, à Paris.

give references, naturally enough, to some one in England. I know of no one but my own family. He wishes for some one accustomed to manage a house. I have given references to Martha, trusting *she will be good enough to answer for me. He is very particular, and will know the why and the wherefore of everything. If I obtain the situation I will write to you immediately." * * *

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Application had been made to the Baronne de Combertain, who stated that Letitia Langton had left her house in a hackney coach, but she knew not whither. It was also stated, that Letitia Langton had been met in the streets of Paris by the Baron de Combertain.

Search had been made at the register of deaths in Paris from 1835, but it was certified that no "Acte de décès" of Letitia Lonsdale was on the register.

An advertisement for her, by the name of Lonsdale, had been inserted in the *Presse* newspaper, in Paris, on the 2nd of February, 1851, offering a reward for intelligence respecting her.

Application had also been made to the police in Paris, but no information could be obtained on the subject.

Application had been made to the proper tribunal at Arcis-sur-Aube, but no intelligence could be obtained of her or of M. Bonbutier, the gentleman mentioned in her letter.

It was in evidence, that, on the receipt of the letter from Letitia Langton, stating that she had abandoned the Protestant religion, her sister addressed to her at Paris a letter of remonstrance and reproach at her conduct, which was addressed to her at the residence of Madame la Baronne de Combertain; but that no reply had ever been received to such letter.

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Mr. Elmsley and *Mr. W. D. Lewis*, for the petitioner, asked that the share of Letitia Langton might be paid to her next of kin. In the case of *Dowley v. Winfield* (1), where A. went abroad in September, 1830, and his father died in September, 1833, and nothing was heard of A. for about fourteen years from a year and a half before his father's death, the Court presumed his death at the date of the death of his father, and ordered A.'s share in his father's property to be paid to his brother, the latter giving security to refund it in case A. should have survived his father.

Mr. Goodeve appeared for the executors.

Mr. Bacon and *Mr. Shebbeare* for other parties.

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THE VICE-CHANCELLOR :

The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this,—that, if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the presumption cannot arise.

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In this case, all the circumstances tend to show, that, after what had taken place between Letitia Langton and her friends, it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter *of remonstrance and reproach for so doing. These reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life, which, it appears from her letters, she pursued, render it improbable that she would have further communicated with her friends. If I am right in this view, it follows, that the presumption of her death does not arise from the absence of information or of communication, when that absence is natural, even if the lady were still alive. There must, therefore, be further inquiry.

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IN RE LAWRENCE, CROWDY, AND BOWLBY.
EX PARTE BURDON.

(2 Sm. & G. 367—375 ; S. C. 23 L. J. Ch. 791 ; 18 Jur. 742 ; 2 W. R. 680.)

Where a client had corresponded and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under the summary jurisdiction of the Court to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance.

The summary jurisdiction of the Court over its officers extends to relief only in cases of personal misconduct and neglect of duty.

A solicitor, who allows his name to be used by others conducting in his name the business of solicitors incurs the peril of personal responsibility.

THIS was a motion on notice by Rowland Burdon, of Castle Eden, Durham, under the summary jurisdiction of the Court over solicitors, “that Benjamin Lawrence, James Crowdy, and Thomas William Bowlby, and each of them, jointly and severally, may, within three days after the service of the order to be made on the

motion, pay into Court, in trust in the cause of *Hamilton v. Burdon*, the sum of 5,777*l.* 7*s.* 4*d.*, with interest at 5*l.* per cent. from the 28th of February, 1853; and also, within such three days, pay to the said Rowland Burdon the sum of 1,294*l.* 18*s.* 11*d.*: with interest at 5*l.* per cent. on the sum of 282*l.* 8*s.* 6*d.*, part of such sum, from the 14th of May, 1852; on the sum of 86*l.* 14*s.* 7*d.*, further part thereof, from the 2nd of December, 1852; on the sum of 115*l.* 14*s.* 2*d.*, further part thereof, from the 8th of July, 1852; and on the sum of *809*l.* 16*s.* 8*d.*, the remaining part thereof, from the 14th of June, 1854."

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It appeared, from the affidavits, that Mr. R. Burdon, as executor of his testatrix, had been made a defendant in the suit of *Hamilton v. Burdon*, and had employed as his solicitors in such suit the firm of Lawrence, Crowdy, and Bowlby, who, previously to December, 1853, carried on business at 25, Old Fish Street, Doctors' Commons; but that Thomas William Bowlby had acted for him in the course of the suit. Numerous letters were written by Mr. Burdon, which were always addressed by him to Mr. Bowlby. The latter gentleman uniformly dated his letters from the place of business of the firm, and occasionally signed his own name, but more frequently that of the firm.

In the early part of 1853 the principal portion of the personal estate belonging to the testatrix had been paid by Mr. Burdon into Court.

On the 12th of May, 1852, Mr. Bowlby sent to Mr. Burdon a letter, stating, that no creditor had come in under the advertisement; and that, the time being expired, the Master had directed the balance at Hoares' Bank, which had been accumulated from dividends, to be paid into Court and invested in Consols, and added to the other fund, "you (Mr. Burdon) retaining in your hands for the present the balance arising from the railway shares, &c., &c., to meet the current expenses." The letter concluded thus:

"Will you therefore send us a crossed cheque on Hoares for 662*l.* 18*s.* in their hands, and we will pay it into Court, and bespeak the Accountant-General's directions to invest it.

"I am, dear Sir, yours very truly,

"T. W. BOWLBY."

Mr. Burdon received the above letter on the 13th of May 1852, and on the same day he sent Mr. Bowlby a cheque for 662*l.* 18*s.*,

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which he at that time supposed to be the amount remaining in his hands due to the testatrix's estate, in order *that it might be paid into Court. He subsequently, however, ascertained that he had paid 380*l.* 4*s.* 6*d.* too much, and he afterwards retained that sum out of other monies received from the estate of the testatrix. On the 2nd of December, 1852, Mr. Burdon sent to Bowlby a further sum of 86*l.* 14*s.* 7*d.* on account of the testatrix's estate. Bowlby in July, 1853, addressed a letter to Mr. Burdon, which contained the following passage :

"The two sums of 662*l.* 13*s.* and 86*l.* 14*s.* 7*d.*, sent to me, were paid into Court in the name of the Accountant-General, and invested by him."

On the 3rd of August, 1852, the Court having directed railway and stock shares to be sold, they were sold by Mr. Burdon, and the proceeds, amounting to 1,485*l.* 3*s.*, paid into his bankers. Bowlby subsequently applied to Mr. Burdon to have the residue of the testatrix's estate paid into Court. In consequence of this application, Mr. Burdon, on the 13th of January, 1853, forwarded to Bowlby two cheques, payable to himself, one on Hoares' Bank for 1,104*l.* 18*s.* 6*d.*, and the other on the Royal British Bank, for 4,292*l.* 4*s.* 4*d.*, which it was subsequently ascertained had been paid in cash to Bowlby on the 21st and the 28th of January. Mr. Burdon wrote to Bowlby to know whether the first had been paid into Court and invested, when he was assured that it had. On the 11th of June, 1853, he forwarded to Mr. Burdon a power of attorney, authorising James Crowdy and Thomas William Bowlby to receive 800*l.*, in order to enable the attornies to receive from the Accountant-General 800*l.*, with a view to pay the same to the Guardian and Provident Insurance Companies, pursuant to an order in the cause, dated the 3rd of August, 1852. Bowlby's letter contained the following passage :

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"The power will enable us to receive the principal sum *of 800*l.*, to be paid to the offices, due in March last, and paid by us. It will also enable us to receive the premiums year by year as they become due."

Mr. Burdon executed the power of attorney ; and it was subsequently ascertained that Bowlby obtained payment from the Accountant-General on the 14th of June, 1853, but did not pay the same to the Insurance Companies. On the 27th of July, 1853, he sent to Bowlby a further sum of 115*l.* 14*s.* 2*d.*, in order that it might be paid into Court ; of which 23*l.* 2*s.* 5*d.* was paid by Bowlby in September, 1853, to Mr. Burdon's account at Hoare's Bank.

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In June, 1854, Mr. Burdon ascertained that Bowlby had paid none of the monies remitted to him into Court, but had applied them to his own use. On the 15th of June, 1854, Mr. Burdon paid to the Insurance Companies out of his own monies the sum of 809*l.* 16*s.* 8*d.*, for principal and interest. In May, 1854, he learned, for the first time, that Lawrence was only a nominal partner in the firm.

It appeared, from the affidavits made in opposition to the motion, that Mr. Lawrence was and had been merely a nominal partner in the firm; that Mr. Crowdy was wholly ignorant of the transactions between Mr. Burdon and Mr. Bowlby; and that Bowlby had ceased to be a partner in December, 1853.

Mr. Bacon and *Mr. F. Riddell* for the motion, [cited *Re Aitkin* (1), *Earl of Cholmondeley v. Clinton* (2), *Blair v. Bromley* (3), and *Brydges v. Branfil* (4)].

Mr. Wickens appeared for Mr. Crowdy.

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Mr. Malins and *Mr. Cairns*, for Mr. Lawrence, contended, that Mr. Burdon was a personal friend of Mr. Bowlby, and had elected to deal with him alone. It was quite clear, therefore, that the other partners were not liable: *Hasleham v. Young* (5).

THE VICE-CHANCELLOR :

This is a case of great importance, and it is attended by some singular circumstances. The application is against three individuals, officers of the Court, for the payment of a sum of money which was remitted to one of them for the purpose of being paid into Court. There is no doubt that a solicitor, who is an officer of the Court, receiving money to be paid into Court, and not paying it, is guilty of misconduct and neglect of duty; and that, under the summary jurisdiction over him as its own officer, this Court can compel him to repay the money.

The question here is free from any difficulty as to the jurisdiction of the Court in that respect. The difficulty of those who support this application is, that it is an application against three individuals, that each of them should be considered as guilty of personal misconduct and personal neglect of duty in respect of the nonpayment of

(1) 22 B. R. 616 (4 B. & Ald. 49).

(3) 71 B. R. 213 (2 Ph. 354).

(2) 13 B. R. 189, p. 190 (19 Ves. 273, n.).

(4) 56 B. R. 71 (12 Sim. 369).

(5) 5 Q. B. 833.

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the money, which is only proved to have reached the hands of one of them. If I were at liberty to treat the case as one in which the money can be held as having constructively reached the hands of all three, Mr. Burdon, who makes this application, would be entitled to an order that all three should be compelled to pay the money. The difficulty in his case is to *show that there has been misconduct by any one of the three except Bowlby.

It is only by an application of the principle of the law of partnership that the other two can be held to be liable. But the summary jurisdiction of the Court is an entirely personal jurisdiction, and is intended to give relief in cases of personal misconduct and personal neglect of duty. In cases of that kind there is a jurisdiction to compel the performance of duty.

In support of this application, it is said that these three individuals carried on business as partners, and were, as partners, in this suit the solicitors of Mr. Burdon; and to that extent the case of Mr. Burdon against the three would be entirely sustainable but for a difficulty created by his own conduct, voluntarily pursued. The duty of solicitors is one that necessarily involves a great degree of personal confidence. The duty of a firm of solicitors, as discharged by a firm, can only be discharged by one member of the firm efficiently, or by means of an agent, an individual clerk or servant acting as agent for all. The singularity of this case is, not that Mr. Burdon merely corresponded with one member of the firm, and did not address his letters to the firm, but that he never corresponded with any member of the firm at all except Bowlby; and when Bowlby, in regard to this particular remittance, by letter requested Mr. Burdon to remit to "us," i.e. the firm, Mr. Burdon voluntarily, by his own act, did not trust the firm, but trusted Bowlby, by sending the money to Bowlby alone, and not to the firm as Bowlby required. He sent the cheques, and gave the control of the money, to Bowlby singly and individually. I apprehend, especially on a question of this kind, that when a person employing a partnership of solicitors does conduct his dealings with one member of that partnership, on such a footing as that the other members of the partnership have not the ordinary means of knowing what was done between the client and their partner, which they otherwise would have had if the money had been remitted to the firm or the letters addressed to themselves, *it is too much to say, that the person so dealing has a right of personal complaint against those whom he thus kept in ignorance. Persons

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who voluntarily deal with an individual partner, so as to put the nature of the transaction between them less within the knowledge of the other partners than it would be if the business were conducted in the ordinary way, cannot complain against those to whom no knowledge of that particular transaction is brought personally home. Under such circumstances, I apprehend the person who voluntarily so deals with a member of the partnership must bear the consequences of that individual partner's misconduct, which he has not given to the other members of the firm the opportunity of preventing.

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I beg it may be distinctly understood, that I dispose of this case upon the footing, that, by his own acts and conduct, Mr. Burdon so conducted himself, that he did not give the other partners the opportunity of knowing what was going on between him and Bowlby. The case I admit to be one of extreme difficulty, attended with circumstances of great singularity; for, as to one of these individuals, (Mr. Lawrence), a course was pursued, which, I think, eminently requires the attention of the Court. This gentleman chose to allow his name to be used by other individuals, who were to conduct, in his name, the business of solicitors; and this gentleman allowed himself to be represented as an officer of the Court, when he was not transacting any business as such officer. I think that any person who places himself in that situation incurs a great responsibility; and if the case here had been merely that of Mr. Lawrence, I should have had greater difficulty than I feel upon it. But when I consider that Mr. Lawrence was, in this case, a partner with Crowdy, and that the conduct of Mr. Burdon, with reference to the partnership, was such as, in my opinion, to deprive the partnership of the fair and proper opportunity which Bowlby invited—if I held that Crowdy, who was an active partner, is absolved by the conduct of Mr. Burdon, I see no ground, however I may *disapprove of the conduct of Mr. Lawrence, by which I can hold that he (Mr. Lawrence) is liable when Crowdy is absolved. The principle of my decision is, that Mr. Burdon, by his own conduct, deprived himself of that right against the other members of this firm, to which he would otherwise have been entitled. This application under the summary jurisdiction of the Court to establish the case of personal misconduct and personal neglect of duty by Lawrence and Crowdy, seems to me, from the conduct of Mr. Burdon, entirely to fail. I must refuse the order against Mr. Crowdy and Mr. Lawrence. The right to the order against

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LAWRENCE.

Bowlby is clear; for that he has been guilty of neglect of duty and personal misconduct is perfectly plain. I shall give no costs on either side.

1854,
Aug. 3.

STUART,
V.-C.
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GOODALE v. GAWTHORNE (1).

(2 Sm. & G. 375—378; S. C. 23 L. J. Ch. 878; 2 W. R. 680.)

A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being *enccinte* of a son, born subsequently. The rents, from the ancestor's death, remaining unreceived by the co-heirs: Held, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir.

THIS was the petition of Elizabeth Goodale, and of Mrs. Moss late Goodale, and her husband, praying that the sum of 273*l.* 2*s.* 10*d.* Consols, and 35*l.* cash, might be divided into thirds, and two-thirds thereof paid to the petitioners.

John Goodale, who was possessed of certain real estate in the county of Derby, died, on the 1st of April, as to the real estate now in question, intestate. At his death, his widow was *enccinte* of a son, who was born on the 29th of October, 1848. At the death of John Goodale, his sisters, the petitioners, were his presumptive co-heiresses-at-law.

A suit was instituted on the 18th of November, 1848, to administer the estate of John Goodale; and on the 12th of January, 1850, it was referred to the Master, to inquire and state what proportions of the rents and profits of the real estates of John Goodale, deceased, had been received by the trustees between the death of John Goodale and the *birth of the posthumous son. On the 11th of February, 1850, Master Dowdeswell certified that the sum of 261*l.* 8*s.* 10*d.* had been so received and paid into Court.

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On the 11th of June, 1851, the widow of John Goodale elected to take an annuity secured by a bond of John Goodale, and her dower, instead of an annuity and legacy given by the will.

The question now raised was, whether the petitioners were entitled to two-thirds of the fund in Court, which arose from rents accruing between the death of the ancestor and the birth of the posthumous heir.

(1) But the cases upon this point are conflicting, for the presumptive heir was held entitled to the intermediate rents in *Richards v. Richards* (1859) Johns. 754, and the residuary devisees were held entitled to the inter-

mediate rents where the trustees of the will had received the same before the birth of the absolute heir: *In re Mowlem* (1874) L. R. 18 Eq. 9, 43 L. J. Ch. 353.—O. A. S.

Mr. Wigram, and Mr. E. Webster, for the petitioners :

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It was settled, that, “where a man has issue a daughter and dies, his wife being ‘*encient*,’ the daughter may lawfully enter, and if she dies, her heir may enter and take the profits for the time; and afterwards, if the wife, being ‘*encient*’ by the ancestor paramount, is delivered of a son, the son may enter, notwithstanding that the heir of his sister is in by descent; but he shall not have an action of account or any remedy for the issues in the meantime before his birth, because that their entry was congeable until he was born;” and the rent which was due belonged to the daughters, who were seised: *Goodtitle v. Newman* (1). In the case of *Bassett v. Bassett* (2), Lord HARDWICKE held, that the posthumous son was entitled to the profits of the descended estate only from his birth.

Mr. Goodeve and Mr. Selwyn appeared for other parties.

Mr. Amphlett for the heir-at-law, but was not called on.

THE VICE-CHANCELLOR :

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The right of the sisters is admitted by counsel very properly to depend on their having been actually seised of the estate as heirs. The seisin being in them from the death of the ancestor up to the birth of the posthumous son, they were heirs in contemplation of law so long as the posthumous heir was unborn. Lord Coke, in his Commentary, 11 b, says that the descent cast upon the presumptive heir until the posthumous heir is born, does not confer an absolute heirship, but only one of a qualified kind. His words are (the case being that of an uncle), “True it is that the uncle in this case is heir, but not absolutely heir.” It is certain that on the birth of the posthumous child, there was an end to the qualified seisin and to all right of entry on the part of the sisters, who had the qualified heirship until the birth of the posthumous child.

The law is settled, that, if during the period of this qualified heirship and seisin in the sisters they had entered and had received the rents, as they might have done, an action of account

(1) 3 Wils. 526, by Chief Justice DE GREY, citing the opinion of Chief Justice BABINGTON, Year Book, 9 Hen. VI. 25 a, c.

(2) 3 Atk. 202. In this case Lord HARDWICKE held, that a posthumous son, claiming under a settlement, was, by construction of the 10 & 11

Will. III. c. 116, entitled to the profits from the death of the ancestor; but he held, that, as to profits of the descended estates actually received, the heir was entitled to an account only from his birth. See, also, *Bullock v. Stones*, 2 Ves. Sen. 521; Co. Litt. 11 b.

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%
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would not lie against them, and they would be entitled to retain what they had received, and which they had lawfully acquired.

[*378] If, however, they did not obtain possession of such rents, but the rents had remained unreceived by them, their seisin being gone on the birth of the posthumous child before they had received the fruits of their seisin—viz. the rents, the right to the rents in such case is in the absolute heir, who has a right to enter and distrain for them. That is what I infer from the principle as stated by Lord Coke; and the law, as settled in the case of *Doe v. Clarke* (1), considers an infant *en ventre sa mère* as born for all purposes which are for his benefit. Then, it is said, they might bring an action for the rent, but no authority has *been cited in support of that proposition; and I apprehend that it would be impossible for them to maintain an action for the rent which the absolute heir had a right to recover by entry and distress, as the proper owner of the freehold. Therefore there must be a declaration that the sisters are not entitled to the rents, which are the property of the posthumous son.

Costs of all parties out of the fund (2).

1854.
July 21.

STUART,
V.-C.

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FERRIS v. MULLINS.

(2 Sm. & G. 378—386; S. C. 18 Jur. 718; 2 W. R. 649.)

The secretary of a Banking Company had a credit account with the Bank to the extent of 3,000*l.*, secured by a memorandum, specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the Bank in 4,000*l.*, there was found in his office in the banking-house the securities mentioned in the memorandum, with others, tied in a bundle, and indorsed and labelled as securities. There was evidence that he had stated that the Bank was secured in 5,000*l.*: Held, that the Bank was equitable mortgagee of all the securities.

THIS was a petition by the Royal British Bank, praying that the sum of 3,429*l.* 7*s.* 4*d.*, standing to the credit of the cause intitled "*Ex parte* the Equitable Claim of the Royal British Bank," might

(1) 3 R. R. 431 (2 H. Bl. 399).
(2) See *Trower v. Butts*, 24 R. R. 164, p. 166 (1 Sim. & St. 184), where Sir JOHN LEACH notices that in *Lancashire v. Lancashire*, 2 R. R. 535 (5 T. R. 49), one of the Judges referred to the maxim of the civil law, that, when the birth of a child happens after the death of a parent, it is, by fiction of law, referred back to his lifetime. Vinnius says, "*Fictione juris nativitas*

retrotrahitur:" 2 R. R. 538 (5 T. R. 59). "A posthumous child," said Mr. Justice GROSE, "must be considered in the same situation and entitled to the same benefits as a child born during the life of the parent:" 2 R. R. 544 (5 T. R. 64). [For the modern doctrine see *Villar v. Gilbert* [1907] A. C. 139, *Re Salaman* [1908] 1 Ch. 4, C. A.—F. P.]

be paid to their secretary and solicitor, Richard Paddison, on account and in part discharge of the claim of the Bank, under the memorandum of the 1st of August, 1850; the petitioners being willing and hereby offering to deal with the other securities held by the Bank as this honourable Court shall direct, and that the order may be made without prejudice to the other claims of the Bank against the estate of the said George Mullins.

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MULLINS.

The suit was instituted by the plaintiff, who was a creditor of George Mullins, on behalf of himself and all other *creditors. Under a decree made at the hearing of the cause, the Bank had carried in a claim for 4,000*l.*, which had been allowed. By an order made by his Honour on the 27th of April, 1854, the Bank, by their secretary, conjointly with Eliza Mullins, the executrix of Edward Mullins, was authorised to receive the proceeds of certain policies of assurance on which the Bank claimed a lien: and in pursuance of such order, the secretary and Eliza Mullins received from the Imperial Assurance Company the sum of 1,432*l.* 9*s.* 4*d.*, and from the Royal Insurance Company the sum of 1,996*l.* 18*s.*, which were paid by them into Court, and constituted the fund which was the object of the present petition.

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It appeared on the affidavits, that Edward Mullins, the testator in the cause, on and prior to the 1st of August, 1850, was and had been, jointly with Mr. Paddison, the solicitor and secretary of the Bank. As such solicitor and secretary, he had an office at 16, Tokenhouse Yard, where the business of the Bank was carried on, containing a repository, of which he, being secretary, kept the key.

On the 1st of August, 1850, the following memorandum, bearing that date, was executed under the hand and seal of the testator, by which he acknowledged, that, in consideration of the Royal British Bank having agreed to allow him credit, on an account to be kept in his name in the books of the Bank, at their head office, to the extent of 3,000*l.*, he, the said Edward Mullins, had that day given his promissory note, bearing date the 25th of July, 1850, to the said Bank, for the same sum, payable to them or their order three months after demand; and had deposited with the said Bank a policy of assurance on his own life, granted by the Royal Insurance Company, dated the 3rd of November, 1849 (numbered 465), for the sum of 999*l.*; and also a policy of assurance on his own life in the Merchant and Tradesman's Life Assurance Society, dated 26th of January, 1849 (numbered, &c.), for 499*l.* 19*s.*; also a policy in the Imperial Life Assurance Company, dated 1st of August,

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1850, *for 1,500*l.* (numbered 5931); also an assignment of a policy on the life of Mary Jane Mullins, in the Economic, for 150*l.*; to which said several policies the said Edward Mullins was well entitled, and for such security as thereafter mentioned did, by the same memorandum, for himself, his heirs, executors, and administrators, covenant and declare with the said Bank, their successors and assigns, that such promissory note has been given and such policies of assurance deposited as aforesaid, and that the same and all monies assured or to become payable by virtue thereof, and the full benefit thereof, and all the estate and interest of the said Edward Mullins in the same premises and every part thereof, “should enure as a continuing as well as a present security to the said Royal British Bank, their successors and assigns, for the repayment of any principal sum or sums of money, subject to such limitation of amount as therein mentioned, which might at any time thereafter, and from time to time, be owing by the said Edward Mullins to the said Royal British Bank, their successors or assigns, on the balance of the said account current; and also for the repayment of any sum or sums of money, subject to such limitation as aforesaid, which the said Bank might have advanced or might thereafter advance, or which the said Bank had or might thereafter become engaged for on account of the said Edward Mullins, either solely or jointly with others, on or by any bill of exchange, drawn, accepted, or indorsed, or any promissory note drawn or indorsed by the said Edward Mullins, or for the payment of which the said Edward Mullins should have in any way become responsible, either solely or jointly with others; or on or by any bond, contract, letter of credit, guarantee, or other obligation, or in any other way whatsoever; as well as for the reimbursement by the said Edward Mullins, his executors or administrators, to the said Royal British Bank, their successors or assigns, of the amount of any loss or expense, subject to such limitation as aforesaid, which the said Bank might sustain or endure by or through their banking transactions *with the said Edward Mullins; any or every such repayment or reimbursement to be made whensoever the same might be demanded by or on behalf of the said Royal British Bank, their successors or assigns, such demand to be made as therein mentioned, with interest at the rate of 5*l.* per cent. per annum, or at such higher rate as the said Bank might for the time being fix, or might be fixed either by advertisement in the newspapers or notice exhibited in a conspicuous part of the public office of the said

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Bank, or might otherwise stipulate, to be paid by the said Edward Mullins on all such monies from the several times when the same should have been advanced, with interest until the repayment thereof, with commission and other charges on the amount of the said credit or the transactions in the said account as the said Bank might usually charge on such credits; the whole amount of money to be ultimately recoverable upon that security, exclusive of any sum or sums of money to be charged for commission, or to be paid or advanced for any purpose, as thereinbefore mentioned, being, nevertheless, thereby limited not to exceed the sum of 4,000*l.* (1). Provided always, that neither the said deposit nor anything therein contained should prevent the said Bank from taking proceedings against the said Edward Mullins upon the promissory note, as well as upon that agreement, for any deficiency that might arise on the said banking account, from the inadequacy of that security to meet the same, or in anywise relating to the security. And the said Edward Mullins did thereby, for himself, his heirs, executors and administrators, covenant with the said Bank, their successors and assigns, that he the said Edward Mullins, his executors or administrators, would, on demand made as aforesaid, repay to the said Bank, their successors and assigns, all and every the sum or sums of money which should be then due to them from him, his executors or administrators."

At the date of the memorandum, Edward Mullins deposited *with the Bank the policies of insurance, dated respectively, on the 3rd of November, 1849, in the Royal Insurance, for 999*l.*; on the 26th of January, 1849, in the Merchant and Tradesman's Insurance, for 499*l.* 19*s.*; on the 1st of August, 1850, in the Imperial, for 1,500*l.*; and also the assignment of the policy in the Economic, for 150*l.* These were the policies specified in the memorandum of agreement.

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But after the execution of the memorandum, he deposited with the Bank a policy of insurance on his own life in the Royal Insurance, dated 18th May, 1851, No. 786, for 1,000*l.*; and also the title deeds of an estate at Box; and the lease of a house, 1, Great James Street, Bedford Row, since given up; and a memorandum of charge by Davis, in favour of Mullins, on land at Battersea. It was to these securities, not specified in the memorandum, that the question on this petition arose. They were all tied up in the same bundle with the securities specified in the memorandum. They all of them

(1) *Sic* in memorandum.

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MULLINS.

were found in the repository of the Bank under Mullins' charge, in the secretary's office. The fund sought to be dealt with by this petition was composed partly of the amount paid on the policies specified in the memorandum, and partly on the policy for 1,000*l.*, which was not therein mentioned.

It appeared from the affidavits, that Edward Mullins had in the secretary's office a repository under his custody, in which, upon search being made after his death, there was found in a drawer in the repository, among other securities belonging to the Bank, several deeds and insurance policies and other documents, tied together in one parcel, with a document on the outside of the parcel, having an indorsement which served as a label to such parcel, and being as follows :

"Cash credit security, policy, dated 1st of August, 1850, 3,000*l.* Edward Mullins to the Royal British Bank."

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Within the parcel were the policy in the Royal Insurance, for 999*l.*; the policy for 1,000*l.*, not mentioned in the agreement; also that in the Imperial Assurance, dated 1850, for 1,500*l.*; also the title deeds relating to the Box property in Wiltshire belonging to the said E. Mullins, and the lease of his house in Great James Street.

It appeared from the affidavit of E. G. Mullins, a nephew of E. Mullins and a clerk in the Bank, that, about a year before his death, he the deponent had informed E. Mullins that he had drawn on his cash credit account beyond the sum of 3,000*l.*, upon which occasion he had stated to the deponent that the overdraft was of no consequence, for that the Bank held securities for his cash credit account to the amount of upwards of 5,000*l.*

At his death, E. Mullins was indebted to the Bank in a sum of 4,000*l.*

Mr. Bacon and Mr. F. T. White for the petitioners :

The Bank was entitled to an equitable mortgage of all the securities which were found tied together and indorsed by Mullins "Cash credit security, policy, dated August 1st, 1850, 3,000*l.* Edward Mullins to the Royal British Bank." Mullins was the officer of the Bank; and had there been any doubt as to his intention to include all the securities which were found so tied together, such doubt would have been removed by the statement made by Mullins to his own nephew, that the Bank held securities from him for 5,000*l.* and upward.

Mr. Craig and *Mr. W. F. Bristowe* for the defendant, the widow:

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The deeds and policies in question were in the separate custody of Mullins, and never were in the custody of the Bank, or of Mullins as officer of the Bank. As the Bank held a memorandum enumerating the specific articles charged by Mullins, strong evidence must be adduced *to show that any deeds or documents not mentioned in such memorandam were intended to be charged by it. The evidence which was adduced by the clerk, viz. the statement by Mullins that the Bank held securities for 5,000*l.* and upwards, was not sufficient evidence to induce the Court to include in the charge anything not included in the memorandum.

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Mr. Speed for the plaintiff, a creditor, whose security was insufficient, contended that there never was any actual delivery to the Bank of the securities in question, and therefore that the claim by the Bank to anything not in the memorandum could not be supported. (He cited *Ex parte Coming* (1).)

THE VICE-CHANCELLOR :

The evidence here is all on one side. The question is, whether the petitioners, the Royal British Bank, have, as between themselves and the creditors of Mullins, a lien upon these deeds, especially upon the policy of assurance for 1,000*l.*, by way of equitable mortgage? The case is, that Mullins, the debtor to the Bank, whose debt to the Bank was secured by the deposit of these deeds, was himself an officer of the Bank—one of their joint secretaries. That there were transactions between him and the Bank, in the course of which there was a deposit of certain deeds to secure the balance due from him as upon a cash account, is not disputed. The only question is, whether this policy of assurance, not mentioned in the memorandum of deposit, is subject to a lien on the part of the Bank? It appears that the advances made by the Bank exceeded the amount stipulated for upon the first deposit and mentioned in the memorandum. It appears also, that another officer of the Bank noticed the excess of the advances made to Mr. Mullins; but that Mr. Mullins said the Bank had sufficient security.

*Applying that expression to the transaction, it can only mean this, that he referred to further security for the further advances beyond the amount mentioned in the memorandum of deposit; the

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(1) 7 R. R. 149 (9 Ves. 115).

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expression would otherwise have no meaning. But the case goes far beyond that, because it appears that the policy of assurance was found tied up in the same bundle with the other deeds, and in the same custody, and on the outside of the bundle was the original memorandum of deposit, describing it as the security for the cash credit. An attempt has been made to show that the custody of the whole of the deeds included in the bundle was not the custody of the Bank, but that they remained in the custody of the debtor, Mr. Mullins. The bundle was found in a drawer in the office at the Bank. That circumstance alone would prove them to be in the custody of the Bank. But it was said that the office in which was the drawer in question, was used by Mr. Mullins for his private business. In the same drawer were found other securities belonging to the Bank, and this clearly shows that the custody was in the Bank, which would be the proper custody; for Mr. Mullins, as an honest officer of and debtor to the Bank, to whom he had given a security, would have dealt with that security exactly in the way in which I find he has dealt with it. All the deeds were tied up together, including the deeds claimed by the Bank as additional security, and deposited by him in the drawer with other securities of the Bank. It was said that the custody was entirely his, because he kept the key of the drawer. The key of a drawer containing securities belonging to the Bank, he would keep as an officer of the Bank. In the absence of any title of evidence to the contrary, I must presume that the conduct of Mr. Mullins was that of an honest debtor, who had given a security, and who had deposited that security in a drawer with other securities of the Bank, he himself having the key of the drawer as an officer of the Bank. I can therefore only attribute the custody of the deeds to the Bank. It is said, there *was no memorandum in writing to show that those other instruments were included in the security of the Bank. But the only important instrument was the policy of assurance tied up in the same bundle and under the same label with those, as to which there is no doubt, and it would be a strange confusion of law to insist upon the necessity of a memorandum in writing in a case of this kind, where there is no question as to real estate; and considering how far this Court has gone even as to real estate in the case of the deposit of deeds, to dispense with the operation of the Statute of Frauds. The policy of assurance was only a chattel interest, and therefore there is no degree of force in the argument that there must be evidence in writing. Here is a case where creditors had

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possession of the policy under circumstances which showed how it came into their possession, and as a security for further advances ; and I know of no principle that would authorise the Court to take an instrument like a policy of assurance from the hands of the creditors who held it under such circumstances, and enable the personal legal representative of the debtor to claim it as a part of his personal estate free from the lien. My opinion is, that the case of the petitioners is sufficiently made out upon the evidence, and I must make an order upon the footing that they are entitled to hold all the deeds and instruments in the bundle, as a security for the balance due to them from the testator.

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v.
MULLINS.

HARRISON v. THE CORPORATION OF SOUTHAMPTON.

1854.
July 5, 25.

(2 Sm. & G. 387—395 ; S. C. 23 L. J. Ch. 919 ; 18 Jur. 669 ; 2 W. R. 659.)

STUART,
V.-C.

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A testator having directed the Corporation to erect a small building as a repository for his furniture, books, manuscripts, &c., and to appoint a person to take care of the same, and to renew the lease thereof when necessary, gave the residue of his personal estate to the Corporation of Southampton, subject to certain legacies, in trust to employ the annual proceeds as may best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and Oriental literature in Southampton, such as by forming a public library, botanic garden, observatory, and collection of objects in connection with the above sciences ; such garden and library to be kept on his leasehold premises : Held, a valid bequest under the 8 & 9 Vict. c. 43 (1).

It is the duty of the Court, where it finds the Legislature intends to legalise the dedication of property to laudable public purposes, to construe the Act, so as to enlarge rather than limit its operation.

In this case a question was raised as to the validity of the residuary bequest contained in the will of Henry Robinson Hartley. The will, which was dated the 30th of August, 1843, after giving certain legacies and annuities, proceeded as follows :

“ And as to the rest, residue, and remainder of my personal estate and effects, I give and bequeath the same and every part thereof unto the mayor and town councilmen of the town and county of the town of Southampton and their successors as a Corporation in trust for the following uses : First, that the said mayor and town councilmen shall cause a small building to be erected on part of my

(1) Repealed by the 13 & 14 Vict. c. 65, in which the substance of the former Act was re-enacted, and this process has been since twice repeated

by the Public Libraries Acts, 1855 and 1892 ; and see the Mortmain and Charitable Uses Act, 1888, s. 6 (4).—O. A. S.

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leasehold estate lying to the eastward of my houses in the parish of Holy Rood, in Southampton, to serve as a repository for my household furniture, books, MSS., and other moveables, and that they should appoint a person with a salary to have the care of the same; and that the said mayor and town councilmen shall keep my leasehold houses in the parish of Holy Rood, Southampton, in good repair, and renew the lease of them whenever the term for so doing shall arise; and after the expenses necessary for carrying the above specified purposes into effect are fully paid and provided for, to employ the dividends, interest, or annual proceeds arising from my said residuary estate, first, in making up to my said two servants, *Elizabeth Compton and Harriet Young, so much of the said annuities of 30*l.* each as my said copyhold estate shall fail to realise and produce clear of legacy duty; secondly, in continuing the payment, in two equal half-yearly portions, of an annuity of 100*l.*, for which I am engaged by bond to pay unto Mrs. Celia Ann Francis, of Portsea, Hants, for the term of her natural life, and not discharging the sum for which the said bond is given; and then to employ the remainder of the said interest, dividends, and annual proceeds, as they may think fit, in such manner as may best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and Oriental literature, in the town of Southampton, such as by forming a public library, botanic garden, observatory, and collection of objects in connection with the above sciences, such library, garden, and collection to be formed and kept, if such can be conveniently done, on my leasehold premises in the parish of Holy Rood, Southampton, aforesaid (that is to say) my late dwelling-house and the houses occupied by Mrs. Warren and Mr. Robert Derben, and the gardens behind the same."

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The testator died in France, in May, 1850, and the bill was subsequently filed by the acting executor, to take the opinion of the Court as to the validity of the above gift. A question had been raised, and an inquiry directed, to ascertain the next of kin of the testator; it had been subsequently decided by a decree of the LORDS JUSTICES that Mrs. Roofe, a defendant, was the next of kin of the testator.

In 1849 the Corporation levied a rate to establish a museum, and in 1850, after the testator's death, formally accepted the bequest. The testator's property was of the value of 120,000*l.*, of which 90,000*l.* had been paid into Court.

Mr. Malins and Mr. G. M. Giffard appeared for the plaintiff.

Mr. Elmsley and Mr. Cole for the defendants, Sarah Ann Roofe, the sole heiress and next of kin of the testator, and William Roofe, her husband :

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This gift was void as within the Statutes of Mortmain, and was not excepted from their operation by the statute 8 & 9 Vict. c. 43, or by the 13 & 14 Vict. c. 65. It is impossible to read the Act without seeing that the testator meant something of a permanent nature to be established and carried out, by building either on his own property or on property to be bought under his will ; at all events, the testator had not excluded the intention to purchase. [They cited *Edwards v. Hall* (1), *Att.-Gen. v. Hodgson* (2), *Re Clancy* (3), *Att.-Gen. v. Davis* (4), *Mather v. Scott* (5), *Giblett v. Hobson* (6), *Trye v. Corporation of Gloucester* (7), *Longstaff v. Rennison* (8).]

Being void then under the Statutes of Mortmain, is this gift made good by the recent Acts? The statute 8 & 9 Vict. c. 43, enables Corporations to accept lands for the purpose of a museum ; but this is a gift of personalty merely, and that Act points at freeholds only. It is true, that the subsequent Act, 13 & 14 Vict. c. 65, includes leaseholds, *and sect. 9 makes valid bequests to all museums already begun, which was not the case here. The testator died in May, 1850 ; the Corporation accepted the bequest in July, 1850 ; and they had previously made a rate for establishing a museum in 1849 ; but the Act 8 & 9 Vict. c. 43, was repealed in August, 1850.

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The *Solicitor-General*, *Mr. Bacon*, and *Mr. Shebbeare*, appeared for the Corporation of Southampton, but were not heard.

Mr. Wickens appeared for the *Attorney-General*.

Mr. Wigram, *Mr. Craig*, *Mr. W. W. Cooper*, and *Mr. Marett*, appeared for other parties, but took no part in the argument.

THE VICE-CHANCELLOR :

The question is not as to the application of the provisions of the

(1) 90 R. R. 552 (11 Hare, 1 ; since affirmed, see 6 D. M. & G. 74).

(2) 74 R. R. 52 (15 Sim. 146).

(3) 96 R. R. 133 (16 Beav. 295).

(4) 7 R. R. 295 (9 Ves. 544).

(5) 44 R. R. 229 (2 Keen, 172).

(6) 41 R. R. 114 (3 My. & K. 517).

(7) 92 R. R. 71 (14 Beav. 173).

(8) 94 R. R. 581 (1 Drew. 28).

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Mortmain Act, because the law at the time when the gift made by this will came into operation by the death of the testator, was regulated by the statute 8 & 9 Vict. c. 43, which was an Act for encouraging the establishment of museums in large towns—museums of art and science for the instruction and improvement of the inhabitants. By that Act the corporations of large towns within its operation were authorised to purchase land and to erect a museum upon that land. In the present case the testator gave the residue of his property to the Corporation of the town and county of Southampton, and devotes it, as I read the will, entirely to purposes of science, for the benefit of the inhabitants of that town.

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It has been contended, that the provisions of the statute 8 & 9 Vict. c. 43, do not apply to this will, because it is said that this testator contemplated purposes more extensive *than the erection of a museum, and that the 8 & 9 Vict. only authorises the erection of museums. The purposes of the testator are stated, first, in very large and general terms, and so as not to direct the erection of a public building and museum at all; for his intention is stated clearly to have been to give the property to the corporation generally to promote the study and advancement of science; and where he mentions a library, garden, and collection, he only mentions them as by way of example or illustration, to show what was in his mind as a proper mode for the advancement of science in that town: he says, “as by forming a public library, &c.”

I am desired to construe this will in connection with the statute in such a way as to hold that a public library, botanic garden, and observatory are not within its provisions. It would seem to be the duty of the Court, where it finds that the Legislature intended to legalise the dedication of property to laudable public purposes, to construe the Act rather as enlarging than limiting the provisions of the statute enacted for that purpose. No doubt, this Act of Parliament authorises corporations of towns, for such purposes, not only to purchase land, but thereon to erect buildings suitable for museums, and suitable for art or science, and to accept any gift, grant, or donation for these purposes. There is a clear authority to erect suitable buildings, and to employ land for the purpose of establishing, improving, or maintaining a museum; and, in the preamble it is stated, that they may do so for the instruction and improvement of the inhabitants of the borough.

If I were to hold, that, where it is clearly lawful to purchase land

for the purposes contemplated by the Act, a garden, observatory, and library are to be excluded, I think I should come to a narrow and unjustifiable conclusion. This testator has only pointed to these particular things as examples of the way in which he wishes his property to be employed to promote study and the advancement of science. I admit, that *this is a large construction of the Act; but I think it was intended that the words should have a liberal construction, and where the object is laudable and tends so much to the benefit of this borough, I do not feel myself authorised to say that the purpose may not be lawfully done within this Act. But it has been said, that this is a case of gift of personal property to be dedicated to these objects; and that, though the statute authorises a devise of lands, tenements, and hereditaments, it does not authorise a bequest of money to be laid out in land for those purposes. But when the words of the statute authorise the purchase of land, it is difficult to hold that a gift of money to be laid out in such a purchase is not within the statute. The Statute of Mortmain does not make every bequest of money to a corporation void, but annuls the gift where the money is to be laid out in the purchase of land. But here the statute says, it shall be lawful to lay out the money for that purpose; and my opinion is, that the money is left to the borough for purposes which are within this statute and lawful, and are not within the Statutes of Mortmain. The argument, as applied to that part of the will which relates to the library, garden, and observatory, I have already disposed of, as these terms are only used by way of example; but I must hold that the corporation are bound to look at the whole objects of the testator. These are only part of the modes in which his property is to be applied for the promotion of science, as stated in his will; for it is plain, that the endowment of lectures and many other modes of advancing science are open to this borough under this bequest; and nothing gives me greater satisfaction than to feel myself authorised to hold that this statute makes valid a bequest which is for a laudable purpose—the property being given to the corporation of this borough, who, I do not doubt, will apply it to proper purposes.

There remains the bequest as to the erection of a building upon the leasehold, which I cannot separate from the general bequest. I cannot hold anything invalid in the *direction to erect that building, where his books and manuscripts may be kept; and it is plain, that, where the books and manuscripts are to be kept,

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there must be some house and furniture; and there is nothing to show that this bequest is not one which will be upheld by this Court.

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(2 Sm. & G. 396—407; S. C. 18 Jur. 1090; 2 W. R. 616; 23 L. T. O. S. 330.)

A testator, after directing that all his just debts should be paid by his executors, devised to his eldest son certain houses, subject, nevertheless, to his paying off the mortgage thereon; and then, having devised to his other sons other houses which he had incumbered, he directed that his sons should not have possession until all his debts should be paid, and he devised to his daughters certain houses which were free from incumbrance, and empowered his executors to receive all rents due to his estate, and to pay his debts, and to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees, and to reimburse themselves: Held, not a general charge of debts on the whole of the real estate.

Devise by the testator to his eldest son, who had died abroad intestate previously to the date of the will leaving an heir: Held, on the construction of the 33rd section of the Wills Act, that the heir of the devisee was entitled by descent from his father.

Devise by the testator to his three daughters of real estate, with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or control of their husbands; the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship: Held, that the daughters took as joint tenants in fee.

SIMON WISDEN, late of Brighthelmstone, in the county of Sussex, gentleman, deceased. duly made and executed his last will and testament in writing, dated the 27th day of June. 1840, as follows:

"First, I order and direct that all my just debts be paid and satisfied by my executors hereinafter nominated and appointed. I give, devise, and bequeath unto my son, Joseph Wisden, all my three dwelling-houses, situate and being Nos. 41, 42, and 48, in Grenville Place, Brighton, aforesaid, subject nevertheless to his my said son Joseph's paying off the mortgage of 750*l.*, which said sum being advanced on the said premises by and for his use and benefit and enjoyed by him. I give, devise, and bequeath unto my son Thomas Wisden my two dwelling-houses, situate and being in Russell Street; and also my two dwelling-houses situate and being Nos. 1 and 2 in the Farm-yard, in Brighton, with the use of the privies therein and appurtenant thereto. I give, devise, and bequeath unto my son Edward Wisden my two dwelling-houses, situate and being, numbered 19 and 20, in Russell Street, with the use of the yard, &c. there and the appurtenances. I give, devise,

and bequeath unto my son William Wisden all those my three dwelling-houses situate and being, numbered 81, 82, and 83, in North Street, Brighton, with their appurtenant. I give, devise, and bequeath unto my son George Wisden all that my dwelling-house, being numbered 80 *and situate in North Street, Brighton, together also with the Herring Dees there, and all the appurtenances thereto belonging. I give, devise, and bequeath unto my son John Wisden all those my three houses situate and being, numbered 47, 48, and 49, in Grenville Place, together also with my butcher's shop and dwelling-house situate in Russell Street: To hold the said messuages or dwelling-houses unto my said sons, their heirs and assigns, for ever. But, nevertheless, I order and direct, that neither of my said sons shall have or take possession of any or either of the said premises until the time that all my just debts shall be paid and satisfied. I give, devise, and bequeath unto my daughter Ann, the wife of Calib Hornby, and Mary, the wife of Walter Tucker, and Johanna Wisden, all that my house in King's Road, being numbered 106, together with all that my property situate in Cannon Place, which I now hold, with the appurtenances: To hold the said last-mentioned premises unto my said three daughters, in joint tenancy, for their own sole use and benefit in succession, and not subject to the debts, control, or management of any husband which they or either of them may have. And I order and direct that the same or any part of the same premises shall not be sold or in any manner be disposed of, but held in succession by my said three daughters; and so that if any one or more of my said three daughters shall depart this life, the survivors or the survivor shall be entitled to and take such deceased sister's part or share in the said premises; and I devise the same accordingly. I give, devise, and bequeath unto my grand-daughter, Maria Mighell, the daughter of William and Maria Mighell, all that my dwelling-house and premises situate and being No. 79, in North Street, Brighton: To hold the same to my said grand-daughter, her heirs and assigns, for ever. But in case my said grand-daughter should die in her minority leaving no lawful issue, the premises so devised to her shall go to my other said three daughters as joint tenants, and I *devise and direct the same accordingly. I give, devise, and bequeath unto my daughter Johanna Wisden all that my dwelling-house and premises situate and being No. 4 in Grenville Place, together with the furniture therein contained: To hold the same to my said daughter Johanna, her heirs and assigns, for ever. And I

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hereby make, ordain, nominate, constitute, and appoint my son-in-law Calib Hornby and William Wisden joint and sole executors of this my will; and do hereby authorise and empower them to receive all rents due to my estate, and to pay all my just debts, and to use such means as shall be necessary for recovering all money due to my estate, and also to grant possession to my devisees as hereinbefore is directed, and also to reimburse unto themselves all reasonable expenses that they may be put unto in the execution of the trust hereby in them reposed."

The testator died on the 12th of December, 1842, and Caleb Hornby having died previously, the will was proved on the 2nd of February, 1843, by William Wisden, the surviving executor.

Joseph Wisden died on the 3rd of April, 1839, (in the lifetime of the testator), in America, leaving Simon Wisden, his only son, his heir-at-law, and also the heir-at-law of the testator.

The houses devised to Joseph Wisden were subject to a mortgage for 750*l*.

The houses devised to Thomas, William, and George Wisden, and Maria Mighell were, at the death of the testator, subject to a mortgage created by him for 2,000*l*.

The houses and hereditaments devised to Edward and John Wisden were, at the death of the testator, subject to a mortgage for 700*l*.

The house, No. 4, Grenville Place, devised by the testator to his daughter Johanna, was subject to a mortgage for 700*l*.; but with that exception, the houses devised by the *testator to his three daughters Ann Hornby, Mary Tucker, and Johanna Wisden were unincumbered.

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On the 21st of March, 1841, William Wisden died, having by his will devised the houses, 81, 82, and 83, North Street, Brighton, and all other his real estate, on trust for sale, and to apply the proceeds in satisfaction of the mortgages, and in the meantime to keep down the interest, with an ultimate trust for his children.

The bill was filed by the infant children of William Wisden, in order to have the trusts of the will of Simon Wisden, the testator in the cause, established by a decree of the Court.

The mortgage debts amounted to 3,450*l*., and other debts to 25*l*. 13*s*. The personal estate had been found to be insufficient to pay the debts.

The first question raised was, whether the words of the will created a general charge of debts on the real estate. Secondly,

whether, under the 38rd section of the Wills Act, 1 Vict. c. 26, the son of Joseph took by descent. Thirdly, whether the devise to the daughters was for life or in fee.

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Mr. Craig and *Mr. Shebbeare* for the plaintiffs [contended, first, that all the real estate must contribute rateably, and cited *Price v. North* (1), *Clifford v. Lewis* (2), *Ball v. Harris* (3), *Robinson v. Lowater* (4). Secondly,] the object of the Wills Act was to prevent a devise made in the lifetime of the devisee from failing by reason of his death before the death of the testator. It never was the intention to give effect to a devise made to a person then not in existence.

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Mr. Bacon and *Mr. Jolliffe* for Simon Wisden, the heir of Joseph :

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The estate devised to Joseph was [not] intended to be charged generally with debts, inasmuch as the testator had made it expressly subject to his paying off the mortgage charged upon it; and therefore, upon the principle that *expressio unius est exclusio alterius*, it was subject to no other burden.

[On the second point they cited *Winter v. Winter* (5), *Mower v. Orr* (6), *Wild v. Reynolds* (7), and *Cole v. Scott* (8).]

Mr. Elmsley and *Mr. Goldsmid* for the other devisees in the same interest.

Mr. Walker and *Mr. G. Simpson* for the testator's granddaughter, contended, that the gift to the three daughters of the testator was only for life. (They cited *Blann v. Bell* (9).)

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Mr. Malins and *Mr. Pigott* appeared for the daughters.

Mr. Grenside for other parties.

THE VICE-CHANCELLOR :

The first question is as to there being a general charge of debts upon all the real estate devised by the testator Simon Wisden.

(1) 65 R. R. 341 (1 Ph. 85).

(2) 22 R. R. 228 (6 Madd. 33).

(3) 42 R. R. 234 (8 Sim. 484.; 48 R. R. 90 (4 My. & Cr. 264).

(4) 17 Beav. 592; subsequently affirmed, 5 D. M. & G. 272.

(5) 71 R. R. 126 (5 Hare, 314).

(6) 82 R. R. 191 (7 Hare, 473).

(7) See 82 R. R. p. 192, where the child died before the Wills Act came into operation.—O. A. S.

(8) 84 R. R. 141 (1 Mac. & G. 518).

(9) 95 R. R. 318 (2 D. M. & G. 775).

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Taking the whole of the will together, I can see nothing to charge the whole of the real estates; but I see very peculiar language which goes to charge the particular estates devised to the sons, language which strengthens the impression upon my mind, that there was no intention on the part of the testator to create a general charge of debts upon all his real estate.

The first words do not create a general charge. They are merely a direction that the debts are to be paid and satisfied by the executors; and immediately following that direction, the testator devises houses to one son subject to his paying off the mortgage debt affecting them. The words which create the real difficulty as to the charge of debts are to be found at the end of the will; and it is remarkable, that the executors, whom the testator directed to pay the debts, are described as the persons who are to take certain funds for that purpose, and those funds are personal estate. The testator gave the executors authority to receive the rents and profits which should be due to his estate at his death (which would be personalty), and to pay all his just *debts, and to use such means as should be necessary for recovering all monies due to him. That would seem to show that the executors were to receive the personal estate, and in the first place thereout to pay his debts.

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The words which create the difficulty are those which say that the executors "were to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees as was hereinbefore directed." These words countenance the argument, that the executors were to take something out of the real estate, for they were to grant possession to the devisees; and that, by implication, seems to make the debts a charge upon the real estate, to which that direction as to possession applies. The previous words in the will explain what the testator meant, for he ordered "that neither of his said sons should have or take possession of any of the premises until the time that all his just debts should be paid and satisfied." Now, coupling the words at the end of the will as to possession, with those words which direct possession to be given by the executors, I think all is made intelligible, and that the testator meant that all his property which he had devised to his sons should be charged with the payment of all his debts. As to the devise to the daughters, there are no words which direct when possession was to be given; therefore, that direction, being inapplicable to them, can have no effect as creating a charge on the estates devised to the daughter. I am, therefore,

of opinion, that the testator intended those estates should not bear any part of the debts or mortgages.

My opinion is, that the debts are charged upon the estates devised to the sons; and I think the state of the assets shows that this was not an inconvenient mode of dealing with the real estate with reference to the charge of debts; for as I understand the result of the accounts is, that all the debts are found to be provided for except the mortgage debts,—as to which, I am of opinion that the first gift is subject only to the mortgage affecting it. I *read the whole of the will together, and the effect of the words is, that the same principle was to be followed out with reference to the gifts to the other sons; but there is a difficulty in doing that, inasmuch as one of the mortgages (that for 2,000*l.*) affects not only the estate devised to one son, but the property given to two or more; and the same observations apply to the mortgage for 700*l.* The result of there being a charge of these mortgages only upon the real estate devised to the sons will be, that, as between the devisees of the estates subject to one mortgage, there must be a rateable contribution according to the value of the property devised. That disposes of the whole question as to the payment of the mortgage debts, and the exoneration of the daughter's property.

Then comes the question as to the gift to Joseph Wisden, who, when the testator made his will, was dead—whether, upon the construction of the 33rd section of the Wills Act, there being no such person as Joseph in existence at the time when the will was written, that clause, which says that lapsed devises in the case of a child shall not be affected by such lapse, shall be read as if the child had not died until after the will was written. It is said, however, that this cannot apply to the case in which no such person was in existence at the date of the will as a son to whom the property was devised. The words of the Act of Parliament are very comprehensive, and seem to include a devise to any child who shall die at any period in the testator's lifetime. The words are, “that where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary

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intention shall appear "by the will." These words point at no particular period of death within the testator's lifetime. The words "shall die" speak from the death of the testator; and I can see no words to refer the futurity of the word "shall" to the date of the will. I consider the words of the clause as meaning that any gift to any child, though not living at the testator's death, is within its operation; and therefore I must construe the will as if the deceased child was alive when the will was written; and I shall hold, that the son of Joseph takes the devised estate by descent from his father, the devisee, under the will.

I have next to consider, whether, there being no words of inheritance in the gift to the daughters of the testator, the estate given to them is for life or in fee.

The case cited has, I think, nothing to do with this case. I must interpret the language of this will by the aid of the Wills Act, and, according to that Act, without words of inheritance, a fee simple will pass, unless a contrary intention appear by the will. It is said, however, that a contrary intention does appear here, because in other parts of the will words of inheritance have been used. My opinion is, that the daughters take as joint tenants in fee.

But it is difficult to treat the case of words of inheritance used as to other estates and other persons, as manifesting a sufficient intention within the meaning of the Act, contrary to that which the Act says shall be the general interpretation as to every devise with reference to which a contrary intention does not appear on the will.

With regard to the only remaining question, I think the express charge on Joseph's estate of the mortgage affecting it, prevents it from being liable to contribute to the other mortgage debts. The testator seems to have intended him to take the whole benefit of that devise after paying off the mortgage.

The following order was then made:

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Declare, that the three dwelling-houses, Nos. 41, 42, and *43, Grenville Place, Brighton, devised by the will of the testator to his son Joseph, are liable to pay and discharge the mortgage debt of 750*l.* in the will and Master's report mentioned, in exoneration of the other real and personal property of the testator. Declare, that the equity of redemption in the said three dwelling-houses, in the event that has happened, passed under the will of the said testator to the defendant Simon Wisden, the only son and heir-at-law of the

said Joseph. Declare, that the fee simple and other the whole estate and interest of the said testator in his house No. 106, King's Road, Brighton, and his property in Cannon Place, Brighton, was effectually devised to his three daughters, Ann, Mary, and Johanna, and the survivors and survivor of them. Declare, that the testator's granddaughter Maria Mighell is entitled to the dwelling-house and premises No. 7, North Street, Brighton, exonerated from any part of the 2,000*l.* mortgage debt. Declare, that the several houses, hereditaments, and premises devised by the will to the testator's sons Thomas, Edward, William, George, and John, as between the devisees of the testator's estate, are primarily liable to pay and discharge the two several mortgage debts of 2,000*l.* and 700*l.* and the simple contract debt of 25*l.* 13*s.* 0*d.*, in proportion to the respective values of the said estates, in exoneration of the said testator's other real property specifically devised and of his personal property specifically bequeathed. Ordered, that the real estates devised to Thomas, Edward, William, George, and John, be sold free from the mortgages of such mortgagees as shall consent thereto, and subject to the mortgages of such mortgagees as shall not consent. Ordered, that the purchase monies shall be paid into the Bank with the privity of the Accountant-General; the purchase money of each lot to be carried to such account as shall be by the chief clerk directed. As to such mortgagees as shall not consent, Ordered, that an account be taken of what is due for principal, interest, and costs, in respect of their mortgages, and without prejudice to the declarations *hereinbefore contained as to the primary liability as between the said devisees to the same mortgage debts. Ordered, that the amount certified to be due to the mortgagees on taking the account be paid out of the purchase monies of the said lots comprised in their respective securities. Ordered, that the further consideration of this case be adjourned, with liberty to apply.

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(2 Sm. & G. 407—415; S. C. 24 L. J. Ch. 123; 24 L. T. O. S. 88.)

Copyholds surrendered to a purchaser to uses similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple, and continued to hold on that admittance till his death; his devisee is bound by the terms of the admittance, and not entitled to claim as appointee under the surrender, so as to defeat the widow's right to free bench.

The Statute of Dower, 3 & 4 Will. IV. c. 105, does not extend to copyholds.

Copyhold land, purchased by the husband, was surrendered to the use

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of him and his assigns for life, and, after his decease, to the use of such person, for such estate, and upon such trust as he by any surrender or by will should surrender or devise, and in default of such surrender or devise, and so far as the same, if incomplete, shall not extend, to the use of the husband, his heirs, and assigns for ever, at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor, the title of the wife could only be destroyed by her voluntary surrender: Held, that she was entitled to her customary dower.

THIS was the petition of Martha Elizabeth Harper, praying that the sum of 16*l.* 16*s.* 7*d.*, now in Court, might be paid to her, being the dividends of a sum of 500*l.* paid into Court, as the purchase money of the copyhold estate, called Mossfields, in the will mentioned, and that the same might be invested.

The petition stated, that, on the 10th of August, 1843, the petitioner became the second wife of George Harper. On the 28th of February, 1851, George Harper purchased from John Faulkener Wood, the customary fee simple of copyhold land held of the manor of Doddington, in the parish of Whitechurch, in the county of Salop, and thereupon, at a court held for the said manor on the 28th of February, 1851, the said John Faulkner Wood and Charlotte Elizabeth, his wife, who was separately examined and consented, in consideration of 120*l.*, did by the rod, according to
[*408] *the custom of the manor, surrender into the hands of the lord of the manor, by their steward, the land then occupied by George Harper, called Mossfields, part of land belonging to the said John Faulkener Wood, of the manor of Doddington, and also of all the ways, waters, &c., &c., &c. thereto belonging, and all the reversion, remainder, rents, profits, use, trust, inheritance, &c., claim and demand of the said J. F. Wood and Charlotte Elizabeth, his wife, in, to, or out of the same piece of land, and every part thereof, "To the use of the said George Harper and his assigns during his natural life, without impeachment of waste, and after his decease to the use of such person or persons, for such estate or estates, and upon and for such trust, intents, and purposes, and with, under, and subject to such powers, provisoes, limitations, and restrictions, as the said George Harper, by any surrender or surrenders, or by his last will and testament in writing or any codicil thereto, or any writing purporting to be in the nature of his will or of a codicil thereto, should surrender, give, devise, or dispose of the same; and in default of such surrender, gift, devise, or disposition, and so far as the same, if incomplete, should not extend, to the use of the said George Harper, his heirs and assigns for ever, at the will of

the lord, according to the custom of the said manor, by and under the rents, hereditaments, and services therefor due and of right accustomed; and the said George Harper being present there in Court, in his own proper person, prayed to be admitted tenant to the lord of the said manor, to the said piece or parcel of land so surrendered, with the appurtenances; to whom the lords of the said manor, by their steward, granted the same and delivered seisin thereof by the rod, according to the custom of the said manor, to have and to hold the said piece or parcel of land, with the appurtenances, unto the said George Harper, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, by and under the rents, hereditaments, and services to the *said lord of the said manor due and of right accustomed; and for such his estate and admittance the said George Harper gave to the lord, for a fine, 1s. 3d., and did his fealty, and was admitted accordingly."

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JONES.

[*409]

It appeared from the affidavit of the steward that by the immemorial custom of the manor of Doddington, the first wife of a copyholder was entitled, for her life, to her free bench or customary dower, from the death of her husband, of the whole of the copyhold land of which her husband was at any time seised for an estate of inheritance. The second wife was entitled to the same interest *durante viduitate*. According to the custom of the manor, the wife's title could not be barred or destroyed by the surrender or other act of her husband, but only by her voluntary surrender made during her marriage after her examination and consent, taken apart by the steward.

George Harper erected certain buildings on the land, and died on the 26th of September, 1851, seised of the said land, having duly made his will, by which he devised the said land to Richard Parry Jones on trust for sale.

On the 4th of November, 1853, Richard Parry Jones contracted to sell the said land for 500*l.* to Robert Burton and the Rev. John Dryden Piggott, and by an order of the Court, made in the cause, in December, 1853, the contract was confirmed. In February, 1854, the purchaser paid into Court the purchase money and interest to the credit of "the Mossfield purchase."

In March, 1854, the petitioner was applied to by the trustee to surrender the premises, in order to bar her dower, and to make a good title and effectual conveyance; which she consented to do and did, upon the understanding that she should have the same interest

POWDELL v. JONES. in the purchase money, in respect of her customary dower, which she had in the land.

[410] *Mr. Malins and Mr. Kenyon* for the petition :

* * It was clear that Harper was admitted to the whole customary fee simple, and it was impossible, therefore, to contend that his will operated as a power. His widow, therefore, would be entitled to her customary dower by a title paramount to the will, unless her right was defeated by the custom of the manor, or by the recent Dower Act, 3 & 4 Will. IV. c. 105.

It was quite clear, however, from the evidence, that the custom of the manor was in favour of the widow's right; and it was equally clear that the Dower Act did not apply to the case of copyhold land (1).

Mr. Wigram and Mr. Charles Hall, contra :

The admittance to copyhold lands shall have relation to the surrender: *Benson v. Scott* (2): and, therefore, as the surrender was to such uses as he should by deed or will appoint, his will must be taken to be an appointment, and therefore the widow's right to dower never attached.

[411] The surrender was the substantial part of the conveyance, and a complete execution of the contract between the vendor and vendee. The surrender and the admittance were *different parts of the same conveyance. "The formal effectuates the substantial part, and, therefore, must relate to it." Both together make but one conveyance: *Vaughan v. Atkins* (3). [They also cited *Boddington v. Abernethy* (4), *Hall v. Hill* (5), and *Lord Chedworth v. Edwards* (6).]

Mr. Bacon and Mr. H. Humphreys and Mr. Druce appeared for other parties.

Nov. 11. THE VICE-CHANCELLOR :

[412] Mrs. Harper, by her petition, claims to be entitled to her free bench, according to the custom of the manor of Doddington, of the piece of land, copyhold of that manor, purchased by her husband, the testator, George Harper, in the year 1851. He was admitted to hold as tenant in fee simple, according to the custom of the manor, and he continued tenant on that admittance at his death.

(1) *Post*, p. 276.

(2) 4 Mod. 252.

(3) 5 Burr. 2786.

(4) 29 R. R. 393 (5 B. & C. 776).

(5) 58 R. R. 223 (1 Dr. & War. 94).

(6) 6 R. R. 212 (8 Ves. 46).

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The custom of the manor is satisfactorily proved to be, that the wife of a copyholder is entitled to have for her free bench or customary dower, from and after the decease of her husband, the whole of the copyhold lands holden of that manor of which the husband was at any time during the marriage seised for an estate of inheritance. If she was the first wife, she was, according to the custom, entitled for the whole term of her natural life; but if the second wife, then for the term of her widowhood only; and this title of the wife cannot, according to the custom of the manor, be barred or destroyed by the surrender or other act of her husband, or otherwise than by a voluntary surrender made by the wife, and if made during the marriage, then after she shall have been first examined by the steward of the manor apart from her husband, and shall have freely consented thereto.

The devisee in trust of Harper, the husband, denies the right of Mrs. Harper to free bench, insisting that she is barred by the terms of the surrender to Harper. That surrender was to the following uses: "To the use of George Harper and his assigns, during his natural life, without impeachment of waste; and after his decease to the use of such person or persons, for such estate or estates, and upon and for such trusts, &c., as the said George Harper, by any surrender or surrenders, or by his last will and testament in writing, or any codicil thereto, or any writing purporting to be or in the nature of his will or of a codicil thereto, shall surrender, give, devise, or dispose of the same; *and in default of such surrender, gift, devise, or disposition, and so far as the same, if incomplete, shall not extend, to the use of the said George Harper, his heirs and assigns for ever, at the will of the lord, according to the custom of the manor."

[*413]

It was argued, on behalf of the devisee, that, the surrender being the governing instrument in the title of Harper, his will operated as an appointment of the uses under the surrender, and that the devisee is in by title paramount under the surrender, so as to defeat the widow's right to free bench.

But the terms of the surrender, which is properly said to be the governing instrument, justified the admittance of the testator Harper to the entire customary fee. The words of the surrender are only an amplified description of the estate and rights of a tenant in fee simple. Lord Coke, in his "Complete Copyholder," p. 82, says the surrender is a thing executory, and the intent of the grantor much favoured; and he also says, that the admittance is

POWDRELL the perfection of the surrender. The intent of the surrenderor in
 F. this case, he being the vendor to Harper, was undoubtedly to make
 JONES, such a surrender as should place the whole fee simple in Harper
 and at his disposal.

It is, therefore, difficult to see any just reason for saying that Harper's admittance on his own prayer to the lord, being an admittance to the entire customary fee simple, was not a proper admittance; and still more difficult to see how any one claiming under Harper can object to such an admittance on such a surrender.

No doubt it is now settled that a power of appointment may co-exist with the fee simple in the same person. But that co-existence is only admitted for extraordinary purposes, and by the subtle application of an operation of the Statute of Uses. Where the question is as to land of copyhold tenure, where the tenancy is filled by an admittance to the whole customary fee simple (the
 [*414] admittance being *justified by the terms of the surrender), those words in the surrender which say that it was to the uses of Harper's will become as nugatory and inconsistent with the notion of his will being an appointment under a power, as the other words, which say the surrender was to the uses of any surrender which Harper might make, are inconsistent with the notion that a surrender by Harper would operate as an appointment under a supposed power in the surrender to him by the vendor. That Harper's will can be treated as an appointment under a supposed power in the surrender to him, is not merely negated by his admittance to the entire customary fee simple. Since the stat. 55 Geo. III., which gives a statutory effect to the disposal of copyholds by will without any previous surrender to the uses of the will, the argument which treats a will of copyholds as the execution of a general testamentary power of appointment certainly seems to me not maintainable in this case, or, perhaps, in any other. The effect of that statute in this case seems to make those words of the surrender which say that it is to the uses of Harper's will nugatory and superfluous words.

It was, however, argued, that the surrender, being the governing instrument, the admittance of Harper to the absolute fee simple could not alter the uses of the surrender; and that, according to the authorities, any variation between the admittance and the surrender might bind the lord, but could not bind any other person. If it be contended that the tenant admitted according to

the terms of his own prayer, and his devisee claiming as a volunteer under his will and bound by his act, are not both bound by the terms of that admittance, that seems to me a mistake.

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What might have been the effect on the widow's claim to free bench, if, before Harper's admittance to the entire fee simple, he had made a will, and admittance on the surrender to Harper had been claimed by his devisee, is not now a question; and if such a question should ever occur, *it may occasion a discussion of some interest on various points, and, among others, on the effect of the stat. 55 Geo. III. c. 192, as applied to such a case. It was urged, that the surrender, as made after the life estate to Harper to the uses of his will, shows that the intention was to bar the right to free bench, by taking it in the form which would bar dower, if the limitations had been in a conveyance of freeholds operating under the Statute of Uses. But the form of the admittance on Harper's own prayer to the customary fee simple, shows clearly enough that Harper himself had no such intention.

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This, therefore, is a case in which the husband having been seised of the fee simple and inheritance of this copyhold during the coverture, the widow is, I think, entitled to her free bench according to the custom of the manor, as proved by the evidence.

It is scarcely necessary to advert to the question whether copyholds are not within the Statute of Dower, 3 & 4 Will. IV. c. 105. The language of the statute itself shows that it refers only to estates which pass by deed and not by surrender, and the opinion of Lord St. LEONARDS is repeatedly expressed, that copyholds are not within that statute.

IN RE LORD SONDES' WILL (1).

(2 Sm. & G. 416—422.)

1854.
July 21.

STUART,
V.-C.
[416]

Where there is a valid appointment to an object of the power, with additional words of appointment in favour of the appointee's children, by which in excess of the power those children are also made appointees, so as to cut down the previous absolute interest: Held, that the words in excess of the power are to be altogether rejected, and that the appointee, who is an object of the power, takes absolutely.

THIS was the petition of Grace Trollope and Charlotte Palmer, praying that one moiety of the sums of 3,061*l.* 7*s.* 7½*d.*, and of 4,800*l.* stock, after payment of costs, might be paid to the petitioners.

(1) *Churchill v. Churchill* (1867) L. R. 5 Eq. 44.

In re
LORD
SONDES'
WILL.

Lord Sondes, by his will, dated the 24th of February, 1830, bequeathed to his brothers, John, Lord Sondes and the Hon. Henry Richard Watson, the sum of 15,000*l.* upon trust, to invest the same in stock, "for the benefit of his sister, Dame Mary Grace Palmer, for her life, and, after her decease, upon trust, to assign, transfer, and pay the said stocks, funds, or securities, unto such one or more of the children of the said Dame Mary Palmer, other than and except her eldest or only son for the time being, and in such parts, shares, and proportions, manner and form, as she, notwithstanding any coverture, and whether sole or covert, by any deed or deeds to be by her executed in the presence of and to be attested by two or more credible witnesses, should direct, limit, or appoint; and in default thereof to assign, transfer, and pay the same unto, between, and among all and every the children of the said Dame M. G. Palmer, other than and besides her eldest or only son for the time being, who being a son or sons should attain that age, or being daughters should attain that age, or marry, with the consent of guardians," &c., with a gift over in the event of Dame M. G. Palmer having no children.

Lewis Richard, Lord Sondes died in March, 1836, and, after his death, the legacy duty was paid on the sum of 15,000*l.*, by which the amount of the bequest was reduced to 14,542*l.* 8*s.* 2*d.*

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The Hon. Henry Watson, by his will, dated the 14th of February, 1832, bequeathed the sum of 15,000*l.* Consols, 3½ Bank Annuities, to John, Lord Sondes and the Hon. Mr. Watson, upon trust, to raise and pay thereout the sum of 1,500*l.*, and to pay the same to his executors as part of his residuary personal estate; and the said testator directed that his trustees should stand possessed of and in such sums of stock, subject to such sale and deduction thereout as aforesaid, upon trust, to pay the dividends and annual proceeds thereof to his niece, the said Dame M. G. Palmer during her life for her separate use, and, after her decease, upon trust, to assign and transfer the said Bank Annuities to such one or more of the children of the said Dame M. G. Palmer, other than and except her eldest son for the time being, and in such parts, shares, and proportions, manner and form, as she, notwithstanding any coverture, and whether sole or covert, by any deed or deeds to be executed in the presence of and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be signed and published by her in the presence of and to be attested

by the like number of credible witnesses, should direct and appoint; and, in default of such direction, limitation, or appointment, as to so much thereof whereof no such direction, or limitation, or appointment should be made, to assign and transfer the same unto, between, and among all and every the children of the said Dame M. G. Palmer, other than and except her eldest or only son, &c., &c., with a gift over in default of children of Dame M. G. Palmer.

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LORD
SONDES'
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The Hon. H. Watson died in August, 1838.

On the 16th of February, 1846, by a deed poll and indenture of even date, a part of the fund was appointed on the marriage of Theodosia, a daughter of Dame Mary Grace Palmer.

Dame M. G. Palmer made her will, dated the 21st of November, 1849, reciting the powers of appointment given *to her by her brother's will; and that she had eight younger children other than her eldest son, and that she had already appointed portions of the said fund, and was now desirous of appointing the unappointed portion. The will then proceeded as follows:

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“ Now, in exercise of the powers or authorities to me given by the said will, and of all other powers and authorities (1) me in this behalf, I do by this my will limit and appoint, give, and bequeath the sum of 13,181*l.* 5*s.* sterling, being the unappointed part of the sum of 15,000*l.* sterling mentioned in the will of my said brother Lewis Richard, Lord Sondes, after deducting the legacy duty payable in respect thereof, and the two several sums of 12,245*l.* 10*s.* 6*d.* 3 per cent. Consolidated Bank Annuities, and 19,200*l.* 3½ per cent. Bank Annuities, mentioned in the will of my uncle, the said Henry Watson, unto all my younger children, except the said Theodosia Mary Maunsell, in equal shares as tenants in common, and their respective executors, administrators, and assigns, except as to the shares of Grace Trollope and Charlotte Palmer in the said monies, I direct that the same shall be held for their sole benefit, independent of any husband with whom they may respectively marry; and that, after their deaths, I direct that the same shall be divided among their children, in such manner as they may respectively appoint by deed or will, notwithstanding coverture; and in default of appointment, then I appoint the same to an only child wholly, or amongst all such children equally, if more than one; but, in default of my said daughters leaving child or children, then the share of each daughter so dying without child or children, I direct to be equally divided among all my younger sons.”

(1) *Sic* in original.

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SONDES'
WILL.
[*419]

The testatrix then appointed the sum of 25,000*l.* to her *husband for his life, and after his decease, as to 2,000*l.*, part thereof, to her daughter Charlotte Palmer. She then used the following language : " Provided, nevertheless, that, as to the share of my said daughter Charlotte Palmer of and in the said last-mentioned trust monies, I direct the same to be held for her sole benefit, independent of any husband whom she may marry, and then to be divided among her children, if she has any, in such manner as I have hereinbefore directed with respect to the monies hereinbefore appointed to her and her sister Grace Trollope, under the powers given to me by the wills of my said brother Lord Sondes and my uncle Henry Watson; and in the event of her making no appointment, then the share of my said daughter Charlotte Palmer to go to her only child, if only one, or to all her children equally, if more than one; and, in the event of my said daughter Charlotte Palmer dying without leaving a child or children, then I direct her said share in my separate property to be equally divided among all my sons."

The testatrix Dame M. G. Palmer died on the 24th of November, 1853. At that date Mrs. Trollope had two children.

On the 1st of March the trustees under Dame M. G. Palmer's will paid the sons their legacy, and transferred Mrs. Trollope's and Miss Charlotte Palmer's shares into Court under the Act.

This petition now asked for the payment out of Court of the fund.

It was admitted at the Bar that the appointment by Lady Palmer in favour of her grandchildren was invalid, as being an excess of the power.

Mr. Archibald Smith for the petitioners :

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The appointment to the petitioners being good, and the appointment to their children void, the result was, that their interests became absolute, or, at all events, only liable to be *defeated in the event of their dying without leaving any child or children: *Carrer v. Bowles* (1), *Harvey v. Tracey* (2).

Secondly, it was contended that the word "leaving" in the ultimate limitation must be construed as "having," and that therefore the share of Mrs. Trollope, who had had children, had become absolute: *Goymour v. Pigge* (3).

(1) 34 R. R. 102 (2 Russ. & My. 301).

(2) 94 R. R. 588 (1 Drew. 73).
(3) 64 R. R. 124 (7 Beav. 475).

Mr. Sidney Smith for the younger sons of Lady Palmer [submitted, that the younger sons of Lady Palmer would take the interest in the fund expectant on the decease of the petitioners under the wills of Lord Sondes and Mr. Watson, by virtue of the gift in default of execution of the power.

In re
LORD
SONDES'
WILL.

It was clear that an ultimate limitation, although following a void limitation, was good where it was a gift over to arise on an alternative event: *Crompe v. Barrow* (1). They also cited *Lassence v. Tierney* (2), and *Gompertz v. Gompertz* (3).

The effect of the whole clause in Lady Palmer's will, taken together, was only to give life interests to the petitioners.]

Mr. Hobhouse appeared for the trustees.

[421]

THE VICE-CHANCELLOR :

The question in this case arises with respect to the right of the petitioners, Mrs. Trollope and Miss Palmer, under the appointment executed by Lady Palmer, their mother. By the wills of her brother, Lord Sondes, and her uncle, Mr. Watson, Lady Palmer had a power of appointment by deed or will over funds of which the property now in question forms a part. By a deed, dated on the 16th of February, 1846, she appointed a portion of the fund in favour of her daughter, Theodosia, as to which no question now arises. The power was large, she might appoint the whole or any portion of the fund to any of her children other than her eldest son, or she might appoint it equally among all her children exclusively of her eldest son.

Had the testatrix gone no further than the gift to Mrs. Trollope and Miss Palmer, no question could have arisen ; but each of them would have been entitled to one-seventh part of the fund. Instead of that, she goes on to attempt to cut down that gift by the subsequent direction in favour of their children. There can be no doubt that the attempt is in excess of the power, and therefore void.

The question then arises as to the effect of this invalid disposition in favour of grandchildren, who are not objects of the *power. It is contended, that no valid disposition can arise after an invalid appointment ; and consequently, that, after the estates for life given to the petitioners, the fund will go to the testatrix's younger children.

[*422]

(1) 4 R. R. 318 (4 Ves. 681).

(3) 78 R. R. 43 (2 Ph. 107).

(2) 84 R. R. 158 (1 Mac. & G. 551).

In re
LORD
SONDES'
WILL.

In my opinion, the case of *Carver v. Bowles* is decisive of this question. In that case, it was held, that, there being a valid appointment, and then an invalid attempt to cut down the interest given by the appointment, the appointee took absolutely. I think that case is an authority that I must follow in dealing with the present case.

But the difficulty here is, that the testatrix has made the right of her daughters, the appointees, to depend on the event of their leaving children. I think, on the true construction of the will, the testatrix intended the gift over only in case her daughters died without having children, and not to depend on the circumstance whether such children should be living at the decease of their mother.

Mrs. Trollope's interest has, therefore, in the event that has happened, become absolute. The share of the other petitioner must abide the event, but in the meantime she will be entitled to the dividends.

1854.
Dec. 12.

BROUGHTON v. BROUGHTON.

(2 Sm. & G. 422—436.)

[Affirmed on appeal as reported in 5 D. M. & G. 160.]

1854.
Nov. 9.

PAXTON v. NEWTON.

(2 Sm. & G. 437—440.)

STUART,
V.-C.
[437]

Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such a lease would work a forfeiture, or that the license of the lord could not be obtained: Decreed to be specifically performed.

Though the Court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair.

THIS was a claim for the specific performance of an agreement for a lease.

The memorandum of agreement between James Newton, of the Uxbridge Road, Ealing, in the county of Middlesex, wheelwright, of the one part, and John Paxton, of Maddock Lane, Ealing, of the other part, was as follows: The said James Newton agrees to let, and the said John Paxton agrees to take, all those premises situate

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in the Uxbridge Road, Ealing, Middlesex, consisting of two dwelling-houses, sheds, workshops, and all appurtenances, now in the joint occupation of the said James Newton and Thomas Newton, his son, for the yearly rental of 80*l.* per annum, payable on the usual quarterly days, 25th of March, 24th of June, 29th of September, and 25th of December, the first quarterly payment to become due on the 29th of September, 1854. The said James Newton agrees to grant to the said John Paxton, his heirs, executors, administrators, and assigns, a lease of the within-named premises, for twenty-one years, at the same rental, viz. 80*l.* per annum, such lease to contain the usual covenants, and the expense of such lease to be paid for jointly by the said James Newton and John Paxton. The said John Paxton also agrees to pay all rates and taxes, land-tax excepted; and the said James Newton agrees to pay all rates and taxes of the said premises up to the 24th day of June, 1854; and the said James Newton further agrees to put the houses and premises in tenantable repair and to put up a new fence in the front within twelve months from this date, the new house to be finished by the 24th day of June, 1854, fit for habitation. And the said John Paxton agrees with the said James Newton, that he the said John Paxton will keep the said premises in repair; and the said James Newton agrees to allow the said John Paxton to remove *all outbuildings he may erect or cause to be erected on the said premises, or to take them at a fair valuation at the expiration of the lease; and further, should the said John Paxton be desirous of purchasing the said premises during the tenancy, the said James Newton also agrees to sell unto the said John Paxton, his heirs, executors, and administrators or assigns, the within-named premises for the sum of 600*l.* And, lastly, the said John Paxton agrees with the said James Newton not to let to Thomas Newton, the son of the said James Newton, either of the above-named premises during the lifetime of Sophia Newton, wife of the said Thomas Newton. As witness our hands this twenty-ninth day of April, 1854.

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"Witness STEPHEN GRANGE.

"JOHN PAXTON,

"JAMES NEWTON, X."

The defendant, by his affidavit, deposed, that, at the time he entered into the said agreement, he was ignorant, not having taken legal advice on the subject and no professional person having been employed in the preparation thereof; that he had no power to comply with the terms contained in such agreement as to

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v.
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granting a lease of the premises therein mentioned, having previously thereto, viz. on the 31st of August, 1853, by a conditional surrender, bearing date that day, surrendered the said premises unto the lord of the manor of Ealing, of which the same were holden, for securing to John Dalton 200*l.*, with interest at 5 per cent.; that the said sum was still due; and that he had, prior and subsequently to the institution of the suit, applied to the mortgagee to concur in granting a lease to the plaintiff, but that he had refused.

Mr. Chichester now appeared for the plaintiff, and asked for a decree for specific performance of the agreement.

Mr. Speed, for the defendant, contended that in this case the Court would leave the plaintiff to his legal remedy.

[439]

The property was copyhold, and the plaintiff had no power to grant a lease for twenty-one years.

Secondly—The property was in mortgage, and the mortgagee refused to concur in granting a lease. It was quite obvious, therefore, that, if this Court were to make the order sought by the plaintiff, the defendant could not obey it. It was submitted that this Court would not place a defendant in such a position. There was no rule better established than that this Court would not direct a part only of an agreement to be performed: *Hills v. Croll* (1), *Dietrichsen v. Cabburn* (2). The material part of the agreement was, that the premises should be put in repair.

This was, therefore, in effect, an attempt to obtain a decree for specific performance of an agreement to repair the premises, a species of jurisdiction which it was well settled this Court would not exercise: *Hill v. Barkly* (3), *Kimberly v. Jennings* (4), overruled by *Lumley v. Wagner* (5).

Mr. Chichester replied.

THE VICE-CHANCELLOR:

This is a bill for the specific performance of an agreement for a term of twenty-one years. The conditions are defined; everything

(1) 78 B. R. 23 (2 Ph. 60).

(2) 78 B. R. 17 (2 Ph. 52).

(3) 11 B. R. 147 (16 Ves. 402).

(4) 38 B. R. 130 (6 Sim. 340).

(5) 91 B. R. 193 (1 D. M. & G. 604).

is certain. Nevertheless the right of the plaintiff is resisted by the defendant, because the property agreed to be let is copyhold; and there the case stops as to that part of the defence. He does not say, that, to grant a lease for twenty-one years will work a forfeiture by the custom of the manor, unless he has the lord's license; nor does he say (if such were the custom) that he has applied to the lord for a license to enable him honestly to perform his agreement. Generally, no doubt, a lease for *twenty-one years cannot be granted of copyhold property; but here no evidence of the custom of the manor has been brought before me. There can be no doubt that leases are granted of copyhold property *de anno in annum*; the fact, therefore, that the subject-matter of the agreement is copyhold is no reason why it should not be specifically performed.

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The second objection raised is, that the estate was in mortgage; which the plaintiff must have well known when he entered into the agreement. But what of that? I am yet to learn that a valid lease of the equity of redemption cannot be granted by the mortgagor. No question has been raised as to the title, because the plaintiff is willing to take the best title that the defendant can make.

The next objection raised it has been sought to establish on authority. It is contended that the Court cannot decree specific performance of an agreement to repair; but, even admitting that principle, it is well settled that the Court is in the habit of decreeing specific performance of agreements for the execution of leases containing covenants to repair; and, on looking at this agreement, I see no reason to suppose that there may not be introduced into this lease such covenants as will enable the plaintiff to obtain a proper remedy as to the repairs. I must, therefore, decree specific performance.

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(2 Sm. & G. 441—454.)

Purchase money proved to have been left in the hands of the purchaser as an indemnity in the year 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of a deed contemporaneous with the purchase and executed in order to enable the purchase to be completed, and these recitals stating trusts of the fund under which the plaintiffs were entitled in remainder after two life estates, the last of which

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expired in 1845: Held, that, as the plaintiffs' title in possession did not accrue till 1845, they were entitled, on a bill filed in 1852, to have the trust fund made good out of the assets (real estate) of the purchaser who had died in 1811.

By an indenture, dated the 15th of April, 1763, upon the marriage of William Oland and Grace Toose, certain lands within the manor of Wellington, being the property of the said intended husband, were conveyed to Thomas Greedy and John Yea, on trust, for the use and behoof of the said husband until the marriage, and from and after such marriage in trust for the said William Oland for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the use of the intended wife for life; and from and after her decease in trust to trustees for a term of years since determined, with remainder in tail male to the sons, and in tail female to the daughters of the said husband and wife as tenants in common, with cross-remainders, &c., &c.

The marriage was soon after celebrated, and Wm. Oland died subsequently, leaving Grace Oland his widow, and Mary Oland, her only daughter and heiress-at-law, him surviving.

In February, 1796, Mary Oland, the heiress-at-law of William Oland and Grace Oland his widow, contracted and agreed to sell the estate to Thomas Wood; and the title to the estate being defective, the following scheme was adopted:

[*442] By an indenture, dated the 6th of February, 1796, between Grace Oland of the first part, Mary Oland of the second part, John Minie Poole of the third part, by which a fine was covenanted to be and was levied, reciting the indenture of the 15th of April, 1763; and that William Oland was then dead, leaving Grace Oland his widow, and Mary Oland, his only child and heiress-at-law; and reciting that the said Grace Oland had agreed with the said Mary Oland for the absolute purchase of the said estate for the *sum of 630*l.*, which said sum it was agreed that Grace Oland should set over and assign to Thomas Wood, upon trust to pay the interest of the said sum of 630*l.* to Grace Oland for her life; and after her decease to Mary Oland for life, for her separate use; and after her decease to pay the principal to Ann Oland, the natural child of the said Mary Oland by Baker Toose; and for all and every the children of the said Mary Oland by the first husband she might marry; and for the considerations therein mentioned, the land was assured to the use of John M. Poole, his heirs, in trust &c. for Grace Oland, and her heirs for ever.

Mary Oland and Grace Oland, immediately afterwards, agreed

for the absolute sale of the estate (1) to Thomas Wood for the sum of 680*l.*; and it was further agreed, that the sum of 680*l.* should remain in the hands of Thomas Wood, as an indemnity to him in case he should be disturbed in his possession, until a legitimate child of Mary Oland, entitled to an estate tail under the settlement of 1768, should attain twenty-one, or if there were no such child, until the heir of Mary Oland, at the time of her decease, should have confirmed the sale.

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By indentures of lease and release, dated the 1st and 2nd of March, 1796, between Grace Oland of the first part, J. M. Poole of the third part, Thomas Wood of the fourth part, and John Carpenter of the fifth part, the said estate, in consideration of the sum of 680*l.*, was conveyed to the said Thomas Wood; and in pursuance of the agreement to that effect, the sum of 680*l.* was allowed to remain in his hands, as an indemnity. A receipt for the sum of 680*l.*, signed by the said Grace Oland and Mary Oland, was indorsed on the deed.

By indentures of lease and release, dated the 1st and 2nd of March, 1796, between Grace Oland of the first part, Mary Oland of the second part, Baker Toose of the third *part, and Thomas Wood of the fourth part, reciting the sale of the estate; and that the sum of 680*l.* had been accordingly retained by Thomas Wood, pursuant to the agreement, he paying the interest; and that a marriage was in contemplation between Baker Toose and Mary Oland; and that it had been agreed, that, in order to make some provision for the said Mary Oland for her life, and as well for Ann Oland, the illegitimate child of Mary Oland, as for the other issue of the marriage, the said sum of 680*l.* should remain in the hands of the said Thomas Wood, his heirs, executors, and administrators, upon, under, subject, and liable to the said several trusts, intents, provisions, &c., thereafter expressed, and hereinafter mentioned. It was thereby witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, and to the intent that the said sum of 680*l.*, and the interest thereof, might be secured and applied upon the trusts thereafter declared and hereinafter mentioned, it was thereby agreed between the said parties, that the said sum of 680*l.* purchase-money should still remain in the hands of the said Thomas Wood, his heirs, executors, administrators, and assigns; and the said Thomas Wood did thereby for himself, his heirs, executors, and administrators, covenant with the said Grace

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(1) *Sic* in original.

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Oland, Baker Toose, and Mary, his then intended wife, that he the said Thomas Wood, his executors and administrators, would stand possessed of the said sum of 690*l.*, and the interest thereof, upon the trusts, and to and for the ends, intents, and purposes, and with, under, and subject to the former provisions, upon trust, during the life of the said Mary Oland, or until a legitimate child, who should be capable of confirming the said estate to the said Thomas Wood, should have attained the age of twenty-one, and should so confirm the same, or, in case Mary Oland died without lawful issue, until the heir-at-law of the said Mary Oland should confirm the said estate, by and out of the said sum of 690*l.* to reimburse and indemnify himself and themselves, *and the said hereditaments, against all costs, damages, and expenses which the said Thomas Wood should be put to on account of any inability of the said Mary Oland to sell the said hereditaments to the said Thomas Wood, and subject thereto upon trust to pay the same to the said Mary Oland, her executors, administrators, and assigns, until the said intended marriage; and from and after such marriage, on trust to pay the annual produce into the proper hands of the said Mary Oland, or to such persons as she should in writing appoint, &c.; and after the decease of the said Mary Oland, then as to the said principal sum of 690*l.*, or so much thereof as should be then due, or be remaining in the hands of the said Thomas Wood, upon trust for the said Ann Oland, otherwise Toose, and all and every the children of the said Baker Toose by the said Mary Oland, as the said Mary Oland should by deed or will appoint among such children equally; and if there should be no children of the said Mary, then for the said Ann Oland, &c.

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The settlement likewise contained a covenant by Thomas Wood, that, so long as the sum of 690*l.* remained in his hands, he would pay interest at 4*l.* 5*s.* per cent.; and also, that he, his executors, administrators, and assigns would pay and apply the interest and principal upon the trusts and for the purpose therein expressed. There was also the usual proviso that the said trustee Thomas Wood, his heirs, &c., should not be answerable for any loss or damage by placing the monies in any Bank, otherwise than in case of lawful default.

The settlement was executed by the husband and wife, but was not executed by Thomas Wood, although he acted in the trusts thereof. There were two children of the marriage, who together with Ann Oland were co-plaintiffs in the suit. In February, 1800,

Thomas Wood sold the trust estates to Thomas Fox, and the parties entitled under the trust deed executed a release to the purchaser.

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Grace Oland died in 1805, and Mary Oland in June, 1846, without having exercised her power of appointment.

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Thomas Wood regularly paid interest on the sum of 630*l.* up to the time of his death in 1811; and by his will, bearing date the 14th of May in that year, after giving certain legacies, he devised his real estates to trustees, to the use of his brother-in-law John Carpenter, for life; remainder to his wife Jane Carpenter for life; remainder to J. P. Carpenter for life, with certain trusts for such of his children as should attain twenty-one; and in default of such children, upon trust for the defendants, the children of John Carpenter, with a joint power of appointment. The will also charged all the estates over which the testator had a disposing power with the payment of his just debts, funeral and testamentary expenses, and legacies, and appointed John Carpenter the sole executor of his will.

John Carpenter never proved the will, but continued nevertheless to act in the trusts thereof until 1816, when a commission of bankruptcy issued against himself and his son John P. Carpenter.

In 1819 Mary Toose applied to him, through a Mr. Steele, respecting the trust estates; on which occasion he delivered to Mr. Steele, on her behalf, the trust deed of the 1st and 2nd of March, 1796.

John Bindon, the surviving trustee of the estates devised by Thomas Wood, entered into possession and received the rents and profits until 1846, when he devised them to his son James Bindon.

In 1849, J. P. Carpenter died without children, leaving Betsy Gardiner and Jane Hooman his co-heiresses; who on his death became entitled in possession to the estate devised, under the limitation in the will of Thomas Wood. Shortly after the death of J. P. Carpenter, Jane Hooman died, leaving Henry Hooman, her heir-at-law, who, in conjunction with Betsy Gardiner, brought actions in ejectment against James Bindon, and recovered the estate devised by Thomas Wood.

On the 6th of April, 1852, the plaintiffs filed this bill against the devisees of the will of Thomas Wood, praying that it might be declared that the estates devised by his will were liable to make good the sum of 630*l.*, with interest at 4*l.* 5*s.* per cent., from the death of Mary Toose, and that the defendants might be decreed to

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pay the said sum of 680*l.* and interest, together with the costs of the suit, or that a sufficient part of the devised estates might be sold for effecting such purposes as aforesaid.

Mr. Wigram and *Mr. Elderton* for the plaintiffs. * * *

[448] *Mr. Bacon* and *Mr. Goldsmidt* for the defendants [contended that interest could only be given from the date of the filing of the bill, and cited *Hughes v. Williams* (1), *Francis v. Grover* (2)].

[449] THE VICE-CHANCELLOR :

The great difficulty in this case arises from the length of time over which the evidence must extend, in order to show the plaintiffs' title. The plaintiffs are obliged to show, that, in the year 1796, the trust was created in their favour, of which by this bill they claim the benefit.

[*450] There are in evidence three instruments, one of them being the declaration of trust of the fund in question, which it is admitted was not executed by *Mr. Wood*. This first instrument is essential to the title of *Mr. Wood*, who completed his purchase upon the footing of it. It is a deed of February, 1796, by which, with a view to enable *Mr. Wood* safely, according to the advice he received, to become the purchaser, the grandmother of the plaintiffs is made the purchaser from her daughter, the mother of the plaintiffs, who was entitled to the inheritance of the estate. This conveyance of the inheritance of the daughter to the mother, for a consideration expressed in it, recites in plain terms, *that the transaction was entered into between the mother and daughter, with a view that the sum of 500*l.*, the price purported to be paid by the mother to the daughter for her-inheritance, and a further sum of 130*l.*, making together 630*l.*, the trust sum claimed by the bill, should be deposited in the hands of *Mr. Wood*, the intended purchaser, and should remain in his hands and be held by him, upon trust to pay the interest of it at a definite rate of 4½ per cent. to the grandmother for life, with remainder to the mother of the plaintiffs for life, for her separate use, with remainder to the children, who are the present plaintiffs. This purchase by the mother from the daughter of the inheritance, with the conveyance which contains this recital, was the first step in effecting the sale to *Mr. Wood*. The conveyance to *Mr. Wood* by the grandmother, after she had thus purchased the inheritance from the daughter, is proved; and the

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defendants, who resist the claim to the plaintiffs, rely very much upon the fact, that upon the deed of conveyance from the grandmother, who had thus acquired the fee, to Mr. Wood, the purchaser, there is indorsed a receipt for the 630*l.*, which they say is conclusive against the plaintiffs' case; and conclusive, because although the plaintiffs produce in evidence a deed dated in March, which is referred to as an intended deed in the recital of the deed of February, being the deed declaring expressly the trusts on the part of Mr. Wood, that deed is shown never to have been executed by him.

The case of the plaintiffs, however, does not rest there; for Mr. Wood, having thus become the purchaser of this estate in the year 1796, and having had it conveyed to him in consideration of this sum of 630*l.*, sold the estate in 1800 to a gentleman of the name of Fox; and in the conveyance by Mr. Wood to Mr. Fox, who purchased from him, there is a recital of the conveyance from the plaintiffs' grandmother to Mr. Wood, as showing what was Mr. Wood's title. That is a recital of the deed which brings home *to Mr. Wood as part of his title that very instrument which embodies the trust upon which he was to hold the 630*l.* Taking these instruments together, and upon the evidence before me, it is plain that the receipt indorsed for the 630*l.* on the conveyance executed to Mr. Wood—Mr. Wood taking as part of his title the conveyance under the deed of February, 1796—is not evidence to acquit Mr. Wood of this sum of 630*l.* Upon the evidence before me it is impossible to doubt that the money was not paid according to that receipt; for if it had been so paid, Mr. Wood would have lost that which was the great purpose of the recital in the deed of 1796, namely, the indemnity afforded to him by his retaining this trust fund in his hands on account of a supposed incapacity on the part of the daughter Mary Oland who had conveyed the inheritance to her mother. There is the clearest evidence that the purchase by Mr. Wood, who sold to Mr. Fox in the year 1800, was upon the footing of an impression that there was an infirmity of the title in respect of the supposed incapacity of the plaintiffs' mother, which could not be effectually cured until the title was confirmed on the part of those children who are now plaintiffs.

Taking these facts, it seems impossible to doubt that this sum remained in the hands of Mr. Wood; and if it remained in his hands, I must consider that it was impressed with the trust recited under the deed of 1796, which is a part of his title; and that, according to the

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recital of that deed, this money, until paid by Mr. Wood or by his representatives, was money in which the plaintiffs upon the death of their mother became entitled in possession as cestui que trusts against Mr. Wood, the holder of the fund. The fund is a mere money fund, and not within the operation of the Statute of Frauds as to trusts for land, which requires that the declaration of trust should be in writing. Even if it were within the statute, upon the evidence before me, when there is the execution by Mr. Wood of that deed *of conveyance of 1800, which expressly refers to the deed of 1796, which recites the trust, it would be difficult to hold that there was not under the hand and seal of Mr. Wood all that the Court requires as a recognition by the trustee of the trusts upon which he held this sum of 690*l*.

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When these facts are established, the case is reduced to the simple case of a trust fund in the hands of a trustee claimed by the persons entitled to it in remainder. Mr. Wood died in 1811, having devised his estates to Carpenter, subject to a charge of debts. Mr. Carpenter was not only devisee but also executor. Mr. Carpenter, in the year 1819, which is eight years after the death of Mr. Wood, the trustee, is proved, by the evidence of Mr. Steele, to have been applied to on behalf of the mother, who was the tenant for life of the trust fund : and his conduct materially supports the case of the plaintiffs ; for he at once acknowledged the existence of the trust fund, and not only acknowledged the existence of the trust fund, but, he being the executor of Mr. Wood the trustee, acting with perfect honesty and propriety, gave to Mr. Steele, who applied to him on behalf of the plaintiffs' mother, the tenant for life, that very deed of March containing the declaration of trust, which had not been executed by Mr. Wood, the trustee, but which his executor delivered from his custody to the person who claimed to be the cestui que trust. This is a circumstance so strong, that it would relieve the case from any doubt or difficulty with regard to the existence of the trust. Mr. Carpenter lived until the year 1849, and in 1849 the present defendant came into possession of these devised estates of Mr. Wood, which were subjected by Mr. Wood to the payment of his debts.

It is said, however, that this is an extremely stale demand ; for, admitting this fund to be a trust fund, and in the hands of and due from the testator Mr. Wood, that, upon Mr. Wood's death in 1811, the primary fund for the payment of this sum, and for satisfying the claim of *the plaintiffs, was his personal estate ; and that, if the

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plaintiffs had applied in time, his personal estate might have been sufficient.

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But that is no reason why on their right in remainder coming into possession, they are to be held too late in asserting this demand.

In the case of *Bennett v. Colley* (1), where there was no express trust, but where the claim of the plaintiffs against the assets of a testator for the loss occasioned to the remaindermen by the testator having failed to renew a leasehold under an ecclesiastical title, the lease had been allowed to expire in 1800, and then the damage, in respect of which the bill was filed, accrued; but the bill was not filed until 1831. It was there argued with great force, that, inasmuch as the person entitled in remainder might have filed a bill in 1800, the fact of his acquiescing for thirty-one years without making any demand, was a reason for the Court refusing its assistance. The effect was said to be, that a double term of grace was to be allowed to a suitor in this Court, the first commencing from the instant when the wrong was committed, and the second from the time when the amount of that wrong became most easily capable of estimation. The Court however held, that the plaintiff was entitled to relief.

In this case one of the terms of the trust was, that the tenant for life had a power of appointment. How can it be said that any one of these plaintiffs, if they had filed a bill before 1845, that is, before the death of the tenant for life, could have stated what his or her exact interest in the trust fund was, while the interest of any one of them was liable to be entirely defeated by an appointment. Therefore, both upon principle and upon the authority of the case of *Bennett v. Colley*, I cannot entertain the argument, *that, because a bill might have been filed in 1811, or any time between 1811 and 1845, by the persons entitled in remainder, the plaintiffs are too late when they file this bill within seven years after the death of the tenant for life.

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The plaintiffs here seek to recover a trust fund, where the trust is proved, and where it is clear that the devised estates in the hands of these defendants are liable to make good the claim of the plaintiffs; and my opinion therefore is, that the plaintiffs are entitled to a decree in their favour. With reference to the amount of the interest, having regard to all the circumstances, I am not disposed to go further back than the death of the tenant for life; and it

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must be at the rate stated, that is, four-and-a-quarter per cent. from that date. It is certainly a somewhat arbitrary period to take, but the case is very peculiar, and not free from hardship on the part of these defendants. Therefore, declare the plaintiffs entitled to the sum of 630*l.*, with interest at four-and-a-quarter per cent. from the death of the tenant for life in 1845.

1854.
Nov. 20, 27.

ALLEN v. WILLIAMS.

(2 Sm. & G. 455—457.)

Procedure on motion for a writ of *fi. fa. de bonis ecclesiasticis*, or for a writ of *sequestrari facias de bonis ecclesiasticis*, against the incumbency of the defendant, directed to the Bishop of Manchester.

[This procedure is now embodied in Order XLIII., r. 3. The requirements for the issue of the writ are stated in Part II. of the Tables of Official Requirements in Issuing Executions, Nos. 28, 29.—O. A. S.]

1854.
April 27.
June 6, 7.

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MOSS v. HARTER (1).

(2 Sm. & G. 458—466; S. C. 18 Jur. 973; 2 W. R. 540; 24 L. T. O. S. 19.)

By a voluntary settlement in 1848, a settlor transferred a debt to a trustee in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount amongst specified persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave "all his personal estate not otherwise effectually disposed of" to trustees: Held, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848; and secondly, that, even if no such intention appeared, the Wills Act (7 Will. IV. & 1 Vict. c. 26, s. 27) applied only to cases where the power of appointment was equivalent to absolute property.

It is not the duty of the Court to strain the words of a power of appointment, in order to bring them within the 27th section of the Wills Act, but to ascertain whether the power is in the widest and most general terms.

In this suit the plaintiffs, a Mr. Moss and other members of his family, and other persons, claimed to be entitled beneficially, under the trusts of a voluntary settlement, to monies in default of any appointment by the settlor by his will.

(1) This case is not without difficulty, nor is that difficulty removed by Lord ST. LEONARDS' explanation, which is stated and disapproved by the Court of Appeal in *In re Clark's Estate* (1880) 14 Ch. D. at pp. 430,

431; and see *Boyes v. Cook* (1880) 14 Ch. D. 53, 49 L. J. Ch. 350, 42 L. T. 556, and *Phillips v. Cayley* (1889) 43 Ch. D. 222, 59 L. J. Ch. 177, 62 L. T. 86.—O. A. S.

The questions raised involved the construction of the 27th section of the Wills Act.

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By an indenture, dated the 30th of March, 1848, and made between Gilbert Winter, deceased, of the one part, and Joseph Winter of the other part (being the voluntary settlement above referred to), reciting that the said John Moss was *indebted to the said Gilbert Winter in the sum of 15,000*l.*, which the said Gilbert Winter was desirous of settling upon the trusts thereafter mentioned; the said principal sum of 15,000*l.* and interest were assigned by the said Gilbert Winter to the said Joseph Winter, in trust, for such person or persons, in such shares, and upon such trusts and for such intents and purposes and in such manner as the said Gilbert Winter should at any time or times thereafter and from time to time by any deed or deeds, instrument or instruments in writing, to be by him legally executed, direct or appoint; and in default of such direction or appointment, and so far as any such if incomplete should not extend, upon trust to permit the said trust monies to remain upon their then present state of investment, or to invest the same, with power to vary the securities with the consent of the said Gilbert Winter during his lifetime, and to pay the interest, dividends, and annual proceeds of the same to the said Gilbert Winter and his assigns during his life; and after his death to collect and get in the said sum of 15,000*l.*, giving to the said John Moss, his executors or administrators (in case the same or any part thereof should remain in his hands) twelve months notice to pay in the same, and to pay the same to the said John Moss and various members of his family, and other persons, in the shares and manner in the said deed mentioned; and as to all the residue of the said trust monies and premises, in trust for the said Joseph Winter absolutely. The indenture contained the usual powers of maintenance during the minorities of the cestuis que trust, and the usual trustee clauses.

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Gilbert Winter afterwards executed a deed poll under his hand and seal, dated the 30th of October, 1851, and he thereby,—after reciting the indenture of the 30th of March, 1848, in execution of the trust, power, or authority in the said indenture contained, and of all powers or authorities enabling him in that behalf—made certain directions and *appointments in the deed poll contained as to the time and mode of payment of one of the shares, and as to the disposition of two other shares; and he thereby directed Mr. Joseph Winter, the trustee, out of a competent part of the residuary

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trust monies, to pay an annuity of 100*l.* to one Richard Wood for his life. In all other respects he confirmed the above indenture. In a letter, addressed by the testator Gilbert Winter to Mr. Wood, dated the 12th of January, 1852, the former informed the latter of the gift to him of the annuity.

Joseph Winter, the trustee, died in 1852.

Mr. Gilbert Winter, the settlor of the indenture of the 30th of March, 1848, duly made his will, dated the 2nd of August, 1852, and thereby, after directing all his just debts, funeral and testamentary expenses, to be paid, he bequeathed to Thomas Edward Moss and James Collier Harter, their executors and administrators, all monies owing to him from the London and North Western Railway Company, and all interest due or to grow due in respect of the same, upon the same trusts as the same ought to be held if they were monies arisen from a sale of his real estate in his will devised upon trusts for sale; and after giving a legacy of 200*l.* to the said James Collier Harter, he bequeathed all his personal estate "not otherwise effectually disposed of" to his said trustees, upon trusts for the benefit of the several persons in his said will mentioned; with a trust as to the residue of his estate and effects for several persons in the will named, being persons other than those entitled under the trusts of the indenture of the 30th of March, 1848. The testator appointed Mr. Thomas Edward Moss and James Collier Harter executors of his will.

By a codicil, dated the 9th of August, 1852, Mr. Gilbert Winter, the testator, appointed a Mr. Daintry to be an additional trustee and executor; and by a second codicil, dated the 13th of January, 1853, he varied some of the trusts in his will, and revoked the [*161] appointment of *Thomas Edward Moss as trustee and executor, and appointed a Mr. Cunliffe in his place.

On the same 13th of January, 1853, Mr. Gilbert Winter executed a deed under his hand and seal, indorsed on the deed poll of the 30th of October, 1851, and he thereby, in pursuance and in exercise and execution of the trust, power, and authority in the therein within recited indenture contained further varied the trusts in the said deed poll contained in one particular. The above-mentioned codicils and the last-mentioned deed were prepared by different solicitors.

Mr. Gilbert Winter made a third codicil to his will, dated the 14th of February, 1853, by which he gave certain chattels, and in all other respects confirmed his will.

Neither the will nor any of the codicils referred in any manner to the voluntary settlement of the 30th of March, 1848, or expressly purported to exercise the power contained in that settlement or any powers generally.

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Mr. Gilbert Winter died on the 15th of February, 1853, and his will and codicils were proved by Messrs. Harter, Daintry, and Cunliffe.

The testator on various occasions in his lifetime made reference to the provisions contained in the voluntary settlement of 1848; and particularly, on the 8th of February, 1853, only seven days before his death, when dining with Mr. Moss and his family, he referred to the various trusts contained in that settlement, and stated his reasons for the dispositions he had made of his property.

The suit was by several members of the Moss family and the persons entitled under the trusts of the voluntary settlement against the executors and the several persons interested under the will, one of whom was named Moss, and was interested both under the deed and the will.

The plaintiffs prayed for a declaration by the Court, that the will and codicils of the testator, Gilbert Winter, did not operate as an execution of the power of appointment given *to him by the voluntary settlement of the 30th of March, 1848.

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The bill also raised a case of circumstances tending to prove that Mr. Winter had intended that the settlement should reserve to him a power of appointment by deed and not by will, and contained a prayer, that, if necessary, the settlement might be reformed by confirming the power of appointment to be by deed only; but this part of the plaintiffs' case became unnecessary.

The cause came on and was part heard on the 27th of April, 1854, but stood over.

The cause was now brought on for hearing.

Mr. Walker and Mr. J. V. Prior for the plaintiffs :

The power reserved to Mr. Winter, the settlor in the voluntary settlement, did not authorise a disposition by will. [This point became unnecessary.]

The circumstances clearly show that the testator never intended by his will and its codicils to interfere with the trusts of the deed; for, on the same day on which he made the codicil to his will, of the 13th of January, 1850, he by deed varied the trusts of the settlement in a way altogether inconsistent with the intention of

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disposing of the fund by his will. Moreover, the words of the will give the testator's personal estate "not otherwise effectually disposed of." On this form of disposition *two observations arise: 1st, that the monies comprised in the settlement could not properly be called the testator's personal estate; and 2ndly, that the monies so comprised were "effectually disposed of" by the deed.

Mr. Bacon and *Mr. Selwyn* for *Mr. John Moss*, one of the defendants who was in the same interest with the plaintiffs, [cited *Collard v. Sampson* (1), *West v. Ray* (2)].

Mr. Malins and *Mr. Osborne* for the defendants entitled solely under the will:

* * The terms of the 27th section of the Wills Act are sufficiently large to make this will to operate as an effectual execution of the power. The testator had a general power of appointment over the funds comprised in the voluntary settlement within the meaning of that section; and the words "not otherwise disposed of," meant not otherwise disposed of by the will.

[*464] The simple question is, whether this will was an execution *of the power reserved to the settlor by the voluntary settlement.

Mr. Amphlett for other defendants:

The case was also argued on the question, whether, if the will was an effectual execution of the power, the plaintiffs were entitled to have the deed reformed. But it became unnecessary for the Court to refer to that question.

At the conclusion of the argument, the VICE-CHANCELLOR said:

This case depends upon the construction of the 27th section of the Wills Act. I am glad to take a view of the case which relieves it from the embarrassments which that Act may produce in other cases.

Where there is a power given by deed to dispose of property by executing an appointment, the law always requires evidence of an intention to execute the power, in order to make any alleged appointment under the power effectual as a valid appointment.

But the statute has in the 27th section altered the law in this respect, and has said, that, where there is a general power of appointment, a general disposition of property by will shall be

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held to be an execution of that power and to pass the property, unless a contrary intention appears by the will. That enactment supplies an intention, and construes a will as an appointment, unless the will itself declares a contrary intention. In the present case it appears to me upon the face of the will, that the testator did not intend by this will to touch the property which was comprised in the voluntary settlement of 1848. The deed of 1848 stamped a trust upon the 15,000*l.*; and that trust distinctly makes the deed of 1848 itself, if no other deed or will had ever been executed by the testator, a complete disposition of the whole sum of 15,000*l.* It is certain, that, in execution of the power of appointment, the testator did execute two instruments in writing, by which he dealt with *that power in this remarkable way: that in each of these instruments, which were executions of the power, he refers to the trusts created by the deed of 1848 in default of appointment as to the trusts subject to which he intended the property to remain, except so far as he had altered them by these appointments. He has mentioned in these instruments of appointment the trusts in default of appointment in such a way as to make them in truth to be the trusts for the distribution of the property. That being so, there being a deed creating a power, and with trusts declared in default of execution of the power, and two instruments which to a certain extent executed the power, the question is, whether the 27th section of the Wills Act makes a general disposition of the residue of the personal estate, a disposition of so much of the property comprised in the deed of 1848 as remained unappointed.

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The testator says very plainly, that, in dealing with his property by his will, he does not intend to deal with any property "otherwise effectually disposed of." That language is as clear and distinct as language can be. It has been, however, contended that these words "not otherwise effectually disposed of" are to be read as "not otherwise by this will effectually disposed of,"—a construction which would violate the express language of the will, which shows an intention not to touch what was "otherwise effectually disposed of." There was an effectual disposition by the deed of 1848, and by the other instruments; and therefore there is an express intention not to interfere with the property remaining unappointed, which was subject to the trusts of the deed of 1848.

The words of the statute are very remarkable, and, I think, deserve great attention from the extensive application which they

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are likely to have. The words seem to apply only to a case where the testator has power to appoint in any manner he may think proper. It is difficult to conceive more extensive language than that, and, in my view, it is extremely difficult to apply that language to ordinary powers of appointment.

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It was probably the intention of the Legislature that the enactment should only apply to cases like *Cox v. Chamberlain* (1), where the power of appointment was in such ample terms as to amount to absolute property. The other words of the clause are consistent with that view. They are, that the bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate which the testator may have power to appoint in any manner that he may think proper.

There is a careful expression by the testator that he is not disposing generally of all his personal property, and that he excepts such personal property as he has otherwise effectually disposed of.

This view of the case makes it quite unnecessary to enter into the other questions which have been argued.

I must declare that the 15,000*l.* is governed by the trusts of the deed of 1848, and of the two other deeds, and is unaffected by the will.

1854.
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V.-C.
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EX PARTE BEDDOES (2). IN THE MATTER OF THE SHREWSBURY AND HEREFORD RAILWAY ACT, 1846.

(2 Sm. & G. 466—469; S. C. 24 L. J. Ch. 175; 3 Eq. R. 137.)

The costs of investing money paid in by a Railway Company as the price of land taken under their Act, (in redemption of the land tax on other parts of the same property): Held payable by the Company, although not mentioned specifically in sect. 80 of the Lands Clauses Consolidation Act.

THE Shrewsbury and Hereford Railway Company having taken certain land, which was part of other land in settlement, on the 24th of November, 1854, an order was made, that a part of the purchase money should be laid out in the redemption of the land tax on other portions of the settled property, and the residue in the purchase of land to be settled to the same uses, and that the

(1) 4 R. R. 311 (4 Ves. 631).

(2) *In re Bethlem Hospital* (1875)
L. R. 19 Eq. 457; 44 L. J. Ch. 406.

Company should pay the costs. The order was drawn up including the costs of redeeming the land tax.

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A doubt was raised in the Registrar's office, whether, under section 80 of the Lands Clauses Consolidation Act, the costs of reinvesting the purchase money of land taken by the Company in redeeming the land tax were costs properly payable by the Company.

Mr. Faber now submitted, that the Company were bound to pay the costs of investing a part of the purchase money in the redemption of the land tax. * * *

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The VICE-CHANCELLOR made the order.

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SIMPSON *v.* SADD.

(2 Sm. & G. 469—475.)

[Affirmed on appeal as reported in 4 D. M. & G. 665.]

1854.
June 27.

GOLDS *v.* GREENFIELD.

(2 Sm. & G. 476—479.)

1854.
June 28.

STUART,
V.-C.
[476]

A debtor, by deed, assigned his effects for the benefit of his creditors, who thereby covenanted not to sue him. One of these creditors, by will, gave the residue of his estate among six persons, and directed that such of them as should be indebted to him at his decease should accept the debt as part of his share. One of these persons was the debtor: Held, that the debt was satisfied by the assignment and the testator's covenant not to sue; and that the executors were bound to pay to the debtor his full share of the residue.

THIS was a special case.

By an indenture, dated the 31st of May, 1850, and made between the plaintiff of the first part,—John Killick (the testator in the cause, since deceased), Thomas Grant, and Thomas Golds, who were creditors of the plaintiff, of the second part; and the several other persons, parties thereto, being other creditors of the plaintiff, of the third part,—the plaintiff conveyed and assigned his real and personal property to Messrs. Killick, Grant, and Golds, upon trust, for conversion, and thereout to pay the debts due to themselves, Messrs. Killick, Grant, and Golds, and to the other creditors of the plaintiff, parties thereto, of the third part, or so much of such debts as the proceeds would be sufficient to pay rateably among

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them. And, in consideration thereof, the parties thereto of the second and third parts severally and respectively covenanted with the plaintiff, that they the said parties thereto of the second and third parts would not at any time thereafter commence or prosecute any actions or suits at law or in equity against the plaintiff, his heirs, executors, or administrators, or attach his or their estate or effects for any debt then owing by the plaintiff to them; and in case any of the parties thereto of the second and third parts, or their respective heirs, executors, administrators, or assigns, should commence any such action, suit, or attachment, that then the plaintiff, his heirs, executors, or administrators might plead that indenture as a general release in bar.

Mr. Killick was, at the time of the execution of the indenture, a creditor of the plaintiff in the sum of 308*l.*, on a promissory note, dated the 18th of April, 1850, made by the plaintiff; and he was also the surety of the plaintiff, to pay 100*l.* upon a promissory note by the plaintiff and himself to one Joseph Holloway.

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Mr. Killick, by his will, dated the 25th of June, 1850, after bequeathing several legacies, gave all his real and the residue of his personal estate to the defendants Michael Greenfield, Richard Woolven, and Richard Holloway, upon trust, to convert the same, and out of the proceeds to pay one-sixth part to the plaintiff, and to dispose of the remaining five-sixth parts as in the will expressed. The will contained a declaration, in the following words: "My will and mind further is, and I do hereby direct, that such of my legatees as may be found indebted to me at the time of my decease in any sum or sums of money, either upon bond, note of hand, book debt, or otherwise howsoever, and also such sum or sums of money which I or my heirs, executors, or administrators shall pay, or be bound or liable to pay on their account, or on account of their respective parents, that sum or sums of money shall be considered and accepted by him, her, or them, as part of his, her, or their share or shares of and in my estate and effects."

The testator died in December, 1850; and the defendants Greenfield, Woolven, and Holloway, the executors named in the will, duly proved the same shortly afterwards.

The promissory note for 308*l.* of the plaintiff to Mr. Killick was found among the testator's papers.

The defendants, as the executors of the testator, received from the trustees of the deed of May, 1850, 107*l.* 16*s.*, being a dividend of 7*s.* in the pound on the sum of 308*l.*; and they paid to the said

Joseph Holloway 75*l.* 15*s.*, being the residue unpaid by the plaintiff of the sum of 100*l.*, for which the plaintiff and the testator, as his surety, had given their promissory note as above stated. GOLDS
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The defendants had in their hands the clear residue of the testator's real and personal estate, and they had deducted from the one-sixth part or share thereof, to which the plaintiff was entitled, the sum of 75*l.* 5*s.* so paid by them to Joseph Holloway. The plaintiff did not object to this being done.

But the question submitted for the opinion of the Court was, whether the defendants were entitled also to deduct the sum of 200*l.* 4*s.*, being the difference between the 308*l.* which was due from the plaintiff to the testator at the date of the deed of 1850, and the 107*l.* 16*s.*, which the defendants had received as a dividend payable under that deed. [478]

Mr. Selwyn for the plaintiff.

Mr. Craig and *Mr. Waller* for the defendants :

A covenant not to sue is not equivalent to a release; it takes away some of the covenantor's remedies, but does not destroy the debt, which remains a debt due to the creditor. At the highest, it operates in favour of the debtor in a way similar to the Statute of Limitations. Now that statute is no answer to a claim by an executor to set off a debt barred by the statute against a legacy given by a testator: *Courtenay v. Williams* (1), *Rose v. Gould* (2), *Ford v. Beech* (3), *Gibbons v. Vouillon* (4); and the debt so barred may be set off. So this debt may be set off against the plaintiff's share of residue.

The object of such a covenant as that which the testator entered into with the plaintiff in the deed of 1850 was to protect him from personal inconvenience. If an absolute release had been intended to be given by the testator to the plaintiff, a release would have been inserted in the deed. Such deeds as these are not to be strained beyond their obviously expressed intention: *Squire v. Ford* (5).

On the whole construction of the deed of 1850 an absolute release is not to be intended, and the plaintiff must be held to have continued indebted to the testator at the time of his decease within the

(1) 64 R. R. 403 (3 Hare. 539).

(2) 92 R. R. 378 (15 Beav. 189).

(3) 75 R. R. 632 (11 Q. B. 842).

(4) 79 R. R. 593 (8 C. B. 483).

(5) 89 R. R. 326 (9 Hare. 47).

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meaning of the proviso contained in the testator's will; and the amount of such debt ought to *be deducted from the plaintiff's share of residue. (*Bell v. Bell* (1) was also referred to.)

THE VICE-CHANCELLOR:

By the contract, the testator accepted whatever he might get under the deed so entirely in full satisfaction of his debt, that he covenanted not to sue for it. I think that the testator after his covenant not to sue the plaintiff, and after agreeing to accept a dividend under the assignment, has, in fact, bound himself not to treat this plaintiff as indebted to him.

As to the sum of 808*l.*, my opinion is, that it was satisfied by the deed; and I must declare that the executors are not entitled to deduct the sum of 200*l.* 4*s.* out of the plaintiff's share of the residue of the testator's property.

FREELAND v. STANSFELD (2).

1852.
Jan. 12.
1854.
June 27.

STUART,
V.-C.
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(2 Sm. & G. 479—487; S. C. 23 L. J. Ch. 923; 1 Jur. N. S. 8; 2 W. R. 575; 24 L. T. O. S. 41.)

Two surgeons, in consideration of 900*l.* paid by one to the other, entered into partnership for seven years. Before the expiration of a year and a half, the partner who had received the 900*l.* became bankrupt. On a bill by the solvent partner against the bankrupt's assignee: Held, that the consideration for which the 900*l.* had been paid having failed, the plaintiff was entitled to an allowance of a sum proportionate to the period of the partnership which remained, with a lien for that amount on the partnership assets.

Notwithstanding the Bankrupt Act, 1849, sect. 152, a receiver might be appointed on the motion of the solvent partner (3).

THE sole plaintiff in this suit was Mr. Freeland. The only defendants were Messrs. Stansfeld, Adams, and Cotterell, the assignees of Mr. Leech. Messrs. Leech and Freeland were surgeons, in partnership, at Chichester, from the 1st of January, 1850, till June, 1851, when Mr. Leech became bankrupt. The only question [*480] in the cause was, *whether Mr. Freeland was entitled to have any and what portion of a premium of 900*l.*, which he had paid to Mr. Leech on entering into the partnership, allowed to him, as

(1) 83 R. R. 310 (17 Sim. 127).

(2) The apportionment of a premium on the premature dissolution of a partnership is now governed by s. 40 of the Partnership Act, 1890.

(3) On the bankruptcy of a partner the solvent partner is entitled to

manage and wind up the business and receive the assets without interference by persons claiming under the bankrupt: see s. 38 of the Partnership Act, 1890; *Ex parte Owen* (1884) 13 Q. B. Div. 113, 53 L. J. Q. B. 863.—O. A. S.

a charge on the assets in taking the account of the partnership transactions.

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In an indenture, dated the 1st of January, 1850, and made between Edward Leech, who afterwards became bankrupt, of the one part, and the plaintiff Frederick John Freeland of the other part, after reciting that both Edward Leech and the plaintiff had for some time then past practised at Chichester their professions of surgeons and apothecaries, on their separate accounts, but that the practice of Edward Leech had been carried on for a longer period and was to a greater extent than that of the plaintiff; and that it had been lately agreed between them, that, in consideration of Mr. Freeland paying to the former 900*l.*, they would enter into and execute those articles of partnership; and that the plaintiff had paid to Mr. Leech the sum of 900*l.*: In consideration of that sum so paid, and also of their mutual trust and confidence, each of them, Mr. Leech and the plaintiff, covenanted with the other of them, that they would become and continue partners in the profession or business of surgeons, apothecaries, and men-midwives, from the 1st of January, 1850, for a term of seven years, if both of them should so long live, under the style of "Leech and Freeland," upon the terms in that indenture expressed; and that the partners should be entitled to the net gains and profits of the copartnership business in the proportions following: that Mr. Leech should take two equal third parts, and the plaintiff the remaining third part thereof.

The articles of partnership were executed by both parties, and the 900*l.* was paid on the 1st of January, 1850.

Mr. Leech and the plaintiff carried on the partnership practice until the 5th of June, 1851; when Mr. Leech was, on the petition of one of his creditors, adjudged bankrupt, and the defendants were appointed assignees, and the partnership was thereby terminated.

The official assignee, immediately after the bankruptcy, served notices on the debtors to the firm, requiring them to pay their debts to him. The plaintiff remonstrated, and offered to collect the debts; but the assignees required him, as the condition of his being allowed to do so, to give security that he would do so with due diligence, and pay two-thirds of the amount of the debts to the official assignee, and also to submit to and abide by the decision of the Commissioners in Bankruptcy in all questions between him and the assignees. The plaintiff declined these terms. The outstanding debts were upwards of 950*l.*

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Under these circumstances the plaintiff filed this bill. By it he

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STANSFELD.

alleged, that Mr. Leech was insolvent at the time when he entered into the articles of partnership and received the 900*l.* from the plaintiff, and that his bankruptcy had been the result of his living beyond his means; and that by reason of the bankruptcy the plaintiff had been deprived of that for which he had agreed to pay, and had paid 900*l.*; and asked to have the affairs of the partnership wound up, and the debts thereof, including a proportionate part of the sum of 900*l.*, duly paid and discharged out of the debts owing to the partnership at the date of the bankruptcy; and after such payments to receive his share of the said debts and effects of the partnership. The plaintiff, also, claimed to have a lien on the partnership assets for a proportionate part of the 900*l.* which he had paid.

The case made by the defendants was, that the profits of the partnership had during its continuance amounted to 1,646*l.* 10*s.* 10*d.*, and that the share to which the plaintiff was entitled was one-third thereof, which he had actually received; and that such profits had been principally and almost entirely made from the professional attendance of the partners upon persons formerly the patients of Mr. Leech, and not of the plaintiff; and that he had, by the introductions he had obtained, a good professional *connection at Chichester, where the plaintiff continued to practise alone.

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It also appeared, that the plaintiff had been qualified as a medical practitioner only a few months before he entered into the partnership with Mr. Leech, and that he had had a very small practice; but that the bankrupt had been in practice for some years at Chichester, and that he had obtained a very large and highly respectable practice.

Jan. 12.

Mr. Wigram and *Mr. Giffard* now appeared in support of a motion by the plaintiff for a receiver.

Mr. Malins and *Mr. H. Stevens*, for the defendants the assignees, submitted, that the 150th section of the Bankrupt Law Consolidation Act of 1849, authorised the assignees to collect the debts due to the firm in which the bankrupt was a partner (1). * * *

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THE VICE-CHANCELLOR (SIR JAMES PARKER) said,—

He thought the section referred to did not take away the jurisdiction of this Court between the solvent partner and the assignees

(1) As to this point, see the note on p. 306, *ante*.

of the bankrupt partner, or affect the ordinary right of a partner to the interference of this Court; and that the plaintiff was entitled to an order for a receiver.

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By an arrangement, the plaintiff was subsequently appointed receiver.

The cause now came on for hearing.

Mr. Wigram and *Mr. Giffard*, for the plaintiff, cited *Bury v. Allen* (1) and *Hirst v. Tolson* (2).

1854.
June 27.

Mr. Malins and *Mr. H. Stevens* for the defendants. * * *

THE VICE-CHANCELLOR:

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The question is, whether, in winding up the affairs of this partnership, the plaintiff, who is the solvent partner, is entitled to credit for any part of the sum of 900*l.* paid by him as a premium on his entering into a partnership with Mr. Leech. The partnership articles do not show that the plaintiff paid the 900*l.* as a premium for an introduction to a connection; but, as the price of his right to a certain proportion of the profits of the partnership for the term of seven years, during which the partnership was to continue. The partnership had not lasted quite a year and a half, when Leech, who had received the 900*l.* thus paid by the plaintiff, became bankrupt. The bankruptcy put an end to the partnership; and there was an end to the performance of the stipulations which Leech had entered into with the plaintiff, and for which the sum of 900*l.* was paid. It is, therefore, not unnatural,—the term of the partnership being thus cut short, not by any act of the plaintiff, but by the act of Leech,—that the plaintiff should claim to have a return of some proportion of the premium which he had paid to the bankrupt as the price of that which he could no longer obtain.

It is a settled principle, that, if money has been paid as the consideration for a contract which fails, this Court will restore to the person who has paid the money a due proportion of it, having regard to the extent to which the consideration has failed. The principle has been *clearly stated by Lord COTTENHAM in *Hirst v. Tolson* (2), where that learned Judge said, that, “if, independently of the right under the covenant, there is a right arising from the transaction itself, and which would have existed if there had been no covenant—namely, to a return of a portion of the money paid,

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upon the ground that the consideration for which it was paid failed; then that would certainly be a ground of equitable interference, which this Court would regard in administering the estate of an intestate." Here, the equity sought is in administering the affairs of this partnership, which has come to an untimely end, and therefore the greater part of that for which the consideration has been paid is gone. It is true that *Hirst v. Tolson* is not a case of partnership, but relates to the return of the portion of the premium paid by a clerk upon articles of apprenticeship. But the principle applies to a contract for a partnership as much as to any other. The case of *Hamill v. Stokes* (1) was similar to the present. That was a case of articles of partnership. There a young man, being prevailed upon to enter into a partnership with an attorney, in consideration of being admitted into co-partnership with him for a term of five years, bound himself to pay 1,050*l*. The partnership was interrupted in a very extraordinary way: for the bankruptcy by which it was interrupted was that of the young man who was to have paid the premium, and the commission of bankruptcy was sued out by his own partner. No doubt the facts of that case involved a question as to the propriety of the conduct of the partners, but the principle must be still the same. The principle upon which the Court interferes is, that the consideration in respect of which the money is paid fails, and is not obtained by the person who pays the money, in consequence of an unforeseen interruption. Lord ELDON, in the case of *Tattersall v. Groote* (2), acted on the same principle. It is *of course important to see that the claim is made on just grounds; and that the failure of consideration has not been occasioned by the act of the person seeking relief. In this case, part of the complaint of the bill is, that the circumstances of Leech were such at the time when the partnership was entered into that he must have known, although the plaintiff did not know, that there was a probability of the partnership being interrupted by the event which afterwards actually occurred. The evidence shows, that when Mr. Leech received this 900*l*. he was not in flourishing circumstances. His bankruptcy is not accounted for as having been occasioned by any sudden or unexpected loss, but by a progressive course of expenditure beyond the amount of his receipts from his practice. Nor was his bankruptcy brought about at all at the instance of his partner. The plaintiff is thought entitled to a return of a proportionate part of the premium. It remains to be

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(1) 18 R. B. 690 (4 Price, 161).

(2) 14 R. R. Preface viii (2 Bos. & P. 131).

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considered whether—as to this proportion the plaintiff is to prove as a creditor against the estate, or merely have the amount allowed to him as a sum to his credit in winding-up the partnership affairs. The right to the return of this proportion must arise out of the contract of partnership. It would be a strange thing to say that a solvent partner, with a claim against his bankrupt co-partner, which arises out of the partnership contract, is not entitled to have that claim allowed on settling the partnership accounts. It is said, on behalf of the defendants, that the plaintiff's course is to recover as upon a legal right, which presupposes some independent contract and injury in respect of which this right accrued. Here there is no such right, and no independent contract. The right to recover a proportion of this 900*l.* arises from the actual contract of partnership. The principle of lien applies to the case, because the plaintiff, as the only solvent partner, is entitled to receive all the debts due to the partnership.

As to fixing the amount of the proper proportion for the *plaintiff to receive, there was a case before Lord Somers (1),—one of a class of cases which seem frequently to have arisen, viz. that of a premium of apprenticeship, where the course taken by that great Judge was to fix the amount according to the estimate which he had formed in his own mind. I intend to follow this precedent. The declaration will be, that in taking the accounts the plaintiff ought to have credit for the sum of 700*l.*

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With respect to the receivership, I cannot understand upon what principle the official assignee, or any other assignee in bankruptcy, should have interfered with the affairs of this partnership, and with the collection of the debts by the solvent partner. This conduct might have ruined the solvent partner, and might have compelled him to come to this Court to assert his rights. It is most important to the public that questions as to the rights of surviving and solvent partners should be understood, and that it is their right to collect the partnership debts. I shall give the defendants' counsel the opportunity of showing why the official assignee interfered in the way he did.

The case was then argued on the question of costs; but his Honour, after considering all the circumstances, thought that there should be no costs on either side up to this hearing.

(1) See *Therman v. Abell*, 2 Vern. 64.

1854.
June 28, 30.
On Appeal.
1855.
Jan. 26.

THE ATTORNEY-GENERAL *v.* ALFORD.

(2 Sm. & G. 488—497; S. C. 2 W. R. 580; 18 Jur. 592.)

[Varied on appeal as reported in 4 D. M. & G. 843.]

1854.
June 30.

HAWKER *v.* HALLEWELL.

EX PARTE STURGIS.

(2 Sm. & G. 498—508; S. C. 2 W. R. 605.)

[Under the old law of insolvency a mere possibility or expectancy in respect of which no estate or interest vested in the insolvent before the final order of discharge did not pass to the assignee.]

1853.
Dec. 13.
1854.
July 11, 12.

BATES *v.* BROTHERS.

(2 Sm. & G. 509—523; S. C. 23 L. J. Ch. 150, 782; 18 Jur. 715; 2 W. R. 636;
2 Eq. R. 803; 23 L. T. O. S. 305.)

STUART,
V.-C.
[509]

On motion for a receiver at the suit of an equitable incumbrancer, where another equitable incumbrancer later in date had acquired a legal possession, the COURT refused to disturb the possession so acquired, and refused the motion for a receiver.

THIS was a suit by Mr. Bates and his partners, constituting the banking firm of Sir J. D. Paul & Co., who were creditors of the Rev. James Brothers, under a judgment of Hilary Term, 1851, and forthwith duly registered in the Common Pleas, and an indenture, dated the 15th of November, 1851, against Mr. Brothers, Mr. Abraham Dangerfield, and the Archbishop of Canterbury; and it sought a declaration by the Court that a judgment against Mr. Brothers, duly entered up in the Court of Queen's Bench upon a warrant of attorney given by him to the plaintiffs, which had been duly registered in the Common Pleas on the 25th of January, 1851, had become and was a charge upon the rectory of Monks Horton and the vicarage of Brabourne, in the county of Kent, and upon all other the ecclesiastical goods of the defendant James Brothers, in the diocese of Canterbury, in priority to a judgment at the suit of the defendant Abraham Dangerfield, duly entered up and registered in the Common Pleas, and upon which he had obtained a sequestration, and had entered into the possession of the rectory and vicarage, and the receipt of the ecclesiastical revenues thereof. The bill also asked for the usual accounts, and for a receiver, and an injunction against the Archbishop of Canterbury and the defendant Dangerfield.

Two questions arose in this case :

First. Whether the plaintiffs, by force of their judgment registered in the Common Pleas, had a title prior in equity to the judgment of Mr. Dangerfield, whose judgment, though registered at a subsequent date, had been followed by the sequestration ?

Secondly. Whether the plaintiffs had, by the recitals *in the indenture of the 15th of November, 1851, abandoned the right to the charge on the benefices which they claimed ?

The following are the circumstances of the case :

The defendant Brothers, on the 24th of January, 1851, gave a warrant of attorney to the plaintiffs, who, on the following day entered up a judgment thereon as of Hilary Term for the sum of 600*l.*, and duly registered it in the Common Pleas.

A memorandum, dated the same 24th of January, 1851, was indorsed upon the warrant of attorney, and signed by the defendant Brothers only, stating that it was given to secure the payment from the defendant Brothers to the plaintiffs of 300*l.*, and interest at 5*l.* per cent., on the 24th of January, 1854.

An indenture, dated the 15th of November, 1851, was made between the defendant Brothers of the first part, and the plaintiffs of the second part. It contained a recital in the following terms : “And whereas the said James Brothers has requested the said parties hereto of the second part to allow him to receive the said rent charge (being the rent charge of the said ecclesiastical benefices) for his own use, which they have agreed to do upon having the security hereinafter contained.” The defendant Brothers, in consideration thereof, and of the above sum of 300*l.* having been lent to him, assigned all the underwood growing on a certain piece of land, containing eight acres, situate in the parish of Monks Horton, and also all his furniture and effects in and about and belonging to his dwelling-house in the parish of Brabourne, to the plaintiffs, subject to a proviso for redemption on the payment of the said sum and interest on the 24th of January, 1852. This indenture was given for the same sum as was secured by the plaintiffs’ judgment, and was given by way of collateral security for the same.

The sum of 300*l.* not having been paid, the plaintiffs, in *1852 and 1853, under their power of sale, sold the underwood and furniture comprised in their security of the 15th of November, 1851. The proceeds of both sales, after payment of certain costs and expenses, reduced the debt due to the plaintiffs to 200*l.*

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v.
BROTHERS.

On the 13th of December, 1851, a judgment was entered up as of Michaelmas Term in the Court of Queen's Bench against the defendant Brothers by the defendant Dangerfield for 8,000*l.* and costs, payable on the 30th of November, 1852: that judgment was duly registered in the Court of Common Pleas. In 1852 the defendant Dangerfield sued out a writ of *sequestrari facias* upon his judgment, directed to the Archbishop of Canterbury.

The Archbishop, on the 31st of December, nominated and constituted the defendant Abraham Dangerfield to be the sequestrator of the rectory of Monks Horton and the vicarage of Brabourne, and of the rents and profits thereof, and of other the ecclesiastical goods of the defendant Brothers within the province.

There was a prior sequestration then in force, which was satisfied in March, 1853; and forthwith thereupon the defendant Abraham Dangerfield entered into the possession of the rectory and vicarage, and into the receipt of the rents and profits thereof, and has ever since continued in such possession.

Dec. 13.

Mr. W. D. Lewis now moved for a receiver, and for an injunction to restrain the defendant the Archbishop of Canterbury from further proceeding with the execution of the sequestration obtained by the defendant Dangerfield; and also for an injunction to restrain the defendant Dangerfield from proceeding with the execution of the sequestration, or from taking any proceedings on his judgment against the rectory and vicarage, and the profits thereof. He submitted that the plaintiff's judgment had, notwithstanding the 18 Eliz. c. 20, on its registry in the Court of *Common Pleas, become an actual charge in equity on the rectory and vicarage, under the provisions of the 1 & 2 Vict. c. 110, ss. 13 and 19 (1). * * *

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Mr. Glasse and *Mr. J. V. Prior* for the defendant Dangerfield:

The defendant Dangerfield is now in the actual legal possession of the benefice. This legal benefit has been obtained by greater diligence, and a court of *equity will not disturb a legal possession where the equities are equal; and his right is not questioned, except that the plaintiffs seek priority over him. * * *

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(1) This same point had been decided by Lord CRANWORTH as Vice-Chancellor in favour of the charge in the case of *Hawkins v. Gathercole* (1 Sim. N. S. 63), and an appeal was then pending upon the point. On that appeal it was subsequently held that

the registration of a judgment did not create any charge upon an ecclesiastical benefice, as reported in 6 D. M. & G. 1. The argument upon this point is consequently omitted from this report.—O. A. S.

The indenture of the 13th of November, 1851, disentitles the plaintiffs to the relief they seek: by the recitals in that deed the plaintiffs gave up to Mr. Brothers the fruits of his benefice, relying on the security then expressly given to them on the furniture.

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r.
BROTHERS.
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Mr. De Gex appeared for the Archbishop of Canterbury.

Mr. Lewis, in reply, [cited *Gibbons v. Hooper* (1) and *Colebrook v. Layton* (2)].

In the course of the argument *Mr. Lee*, as *amicus curiæ*, mentioned *Flight v. Salter* (3), and *Kirlew v. Butts* (4).

THE VICE-CHANCELLOR:

The effect of granting this motion would be to put the plaintiffs in possession of the fruits of that ecclesiastical benefice which their debtor Mr. Brothers, the incumbent of that living, gave them as a security upon the instrument on which they found their case.

[His Honour then dealt with the point which was under appeal, and subsequently determined in the case of *Hawkins v. Gathercole*, and he observed that he was glad to find that he could dispose of the case without being obliged to enter into that vexed question, and he continued his judgment as follows:]

I think it is the doctrine of this Court, that, if there are *several equitable incumbrancers, one of whom, although subsequent in date to the prior equitable incumbrancers, by greater diligence gets, in aid of his equitable incumbrance, a legal right, of which this Court finding him possessed, will not readily disturb him in his possession. It was very truly stated in argument, that in *Hawkins v. Gathercole* exactly that state of things occurred, and that there the Court interfered to disturb the legal right under the sequestration in favour of a judgment creditor who sued in respect of his equitable right. But the case was not argued upon that ground, nor was that doctrine referred to in the judgment. But that doctrine is too strong to permit me to grant this application for a receiver, which would avoid the sequestration, by which a more diligent judgment creditor has obtained possession of the fruits of the benefice.

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(1) 36 R. R. 726 (2 B. & Ad. 734).

(4) 36 R. R. 727, n. (2 B. & Ad.

(2) 38 R. R. 314 (4 B. & Ad. 578).

736, n.).

(3) 35 R. R. 413 (1 B. & Ad. 673).

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The true construction of the indenture of the 15th of November, 1851, seems against the plaintiffs. The plaintiffs have given up the possession of the fruits of this benefice in favour of the defendant, the owner of the benefice, under such circumstances, that the Court could not appoint a receiver at the suit of the plaintiffs without violating the contract. The recital of the defendant's security is, in plain language, that "the said James Brothers had requested the parties of the second part," that is, the present plaintiffs, "to allow him (Brothers) to receive the rent-charge for his own use, which they had agreed to do upon having the security thereafter mentioned," that is, the express security on the furniture. The rest of the instrument proceeded on that recital, and the plaintiffs, taking the furniture, agreed to allow Brothers to remain in possession of the rent-charge. Having taken the benefit of the furniture, the plaintiffs now seek to gain the rent-charge also, and to disturb the arrangement.

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It has been said, that the latter part of the instrument contradicts this recital; but, upon looking at it attentively *there seems to be no contradiction. I think that the language of this instrument shows it to be an integral part of the contract, that the plaintiffs should have the security of the furniture, and that the fruits of this benefice should be allowed to remain in possession of Mr. Brothers.

It is said, indeed, that the Court is not now asked to disturb the possession of Mr. Brothers, but of the defendant, who is another person who has acquired his right under a judgment against Mr. Brothers. But if there is a distinct contract between the plaintiffs and Mr. Brothers, which puts the plaintiffs as against Mr. Brothers in such a situation as that they cannot, as against him, claim this rent-charge, upon what footing can the Court, consistently with the plaintiffs' contract, disturb, at the plaintiffs' instance, the right of the defendant's judgment creditor, who holds by a right under Mr. Brothers? The plaintiffs seem to be estopped and concluded by this recital and the terms of their security from getting possession of this rent-charge through a receiver after entering into such a contract.

This motion must be refused; the defendant's costs to be costs in the cause.

This motion was renewed before the Lords Justices, by way of appeal from the decision of the VICE-CHANCELLOR, on the 16th of March, 1854, when their Lordships thought the question too

doubtful to interfere in it upon an interlocutory application, and directed the motion to stand over until the hearing.

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The cause came on for decision upon the hearing, and was argued on the 11th and 12th July. [The plaintiff relied principally upon the decision of Lord CRANWORTH as Vice-Chancellor in the case of *Hawkins v. Gathercole*, which was still under appeal and was subsequently reversed as stated in the note *ante*, p. 314; but the VICE-CHANCELLOR declined to follow that decision and dismissed the bill without costs, the plaintiff to pay the costs of the Archbishop of Canterbury, who was a mere formal party.—O. A. S.]

1854.
July 11, 12.

CLARK v. BROWNE (1).

(2 Sm. & G. 524—531; S. C. 18 Jur. 903; 2 W. R. 665; 24 L. T. O. S. 3.)

1854.
July 25.

A testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son, and the other two-third parts thereof to his wife and his son-in-law for their lives, with remainder to the son. The larger part of the amount was, after the date of the will, received by the testator under orders of the COURT, and invested in his name in Consols, some small part of which he sold, but afterwards repurchased in part. The executrix, on the testator's death, treating this stock as the subject of the legacy, transferred the son's one-third to him, and she also transferred the two-third parts to trustees, who paid the income to her and the son-in-law: Held, on the principle of the civil law, that the testator having set apart a specific fund received by him, in order that it may be expressly reserved for the benefit of the legatees, it was not adeemed.

STUART,
V.-C.
[524]

Held, also, that the acts and course of dealing for a period of thirty-two years with the fund, as appropriated to answer the legacy, was a circumstance of great weight in rebutting the case of ademption, and the claim on the footing of a resulting trust.

THE plaintiff in this cause, Mr. George Clark, claimed that a specific legacy given by the will of Mr. Thomas Stringer had been adeemed by the testator in his lifetime, except as to a small part thereof; and that, as the personal representative of the surviving executrix and residuary legatee of Mr. Stringer, he had become entitled thereto.

Mr. Thomas Stringer, the testator, by his will dated the 3rd of March, 1812, gave one-third part of the amount of whatever sum

(1) Disapproved by JESSEL, M. R., in *Harrison v. Jackson* (1877) 7 Ch. D. 339, 47 L. J. Ch. 142, and by BACON, V.-C., in *Manton v. Tabois* (1885) 30 Ch. D. 92, 54 L. J. Ch. 1008, 53 L. T.

289; but the question here was more a question of identification rather than of ademption, and this case is quite distinguishable from *Harrison v. Jackson*.—O. A. S.

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or sums of money might arise and be received from his claim and demand on the estate and effects of the late Sir Charles Booth, deceased, to his (the testator's) son, Dr. Stringer; and he gave one other third part of such amount to Peter Locke and Joshua Sutting Crossley in trust for his daughter Mary Cuming for life, with remainder to her husband John Brompton Cuming for life, with remainder to their children, and in default of issue, with remainder to his son Dr. Stringer absolutely; and he gave the remaining third part of such amount to the same trustees in trust for his wife Rebecca Stringer, for her life, with remainder—as to one moiety, to his son Dr. Stringer absolutely—and as to the other moiety, in trust for his daughter Mary Cuming for life, with like remainders as were limited with respect to the one third part originally given to her; and he gave all the residue and remainder of his personal estate to his wife Rebecca Stringer absolutely, and appointed her and Mary Cuming his executrices.

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The testator died on the 14th of November, 1822, and his daughter Mary Cuming died on the same day, a few hours before her father, without issue. The testator's wife, Rebecca Stringer, and his son, Dr. Stringer, survived him. Mrs. Rebecca Stringer, the widow, duly proved his will.

Mrs. Rebecca Stringer died in January, 1832, having by her will, dated the 15th of July, 1831, given all the residue of her personal estate to her sister Elizabeth Billingsley absolutely, whom she appointed executrix of her will. Miss Billingsley proved the will. Miss Billingsley, by her will, gave the residue of her personal estate to the plaintiff, George Clark, absolutely, and appointed him and another person executors of her will. The plaintiff alone proved the will of Miss Billingsley. He also obtained letters of administration *cum testamento annexo* of Mrs. Rebecca Stringer, to be granted to him on the 4th of July, 1845. The plaintiff thus became the sole legal personal representative as well of Mrs. Rebecca Stringer as of Miss Billingsley, and he was thus also beneficially entitled to the residue of their personal estates and effects.

Dr. Stringer, the son, died in the year 1832, and the defendant Mrs. Elizabeth Newling, widow, his daughter, became his personal representative.

The claim of the testator, Mr. Thomas Stringer, on the estate of Sir Charles Booth, deceased, was, that he was the personal representative and residuary legatee of one Thomas Jenkin, who was one of the next of kin of Sir Charles Booth, for the administration of

whose estate a suit of *Walter v. Maunde* was, at the date of Mr. Stringer's will, in prosecution in the Court of Chancery.

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Under an order in this suit of *Walter v. Maunde*, the sum of 5,000*l.* Consols was transferred by the Accountant-General into the name of Mr. Stringer, the testator, in August, 1813, and in 1816 three other sums were so transferred, making altogether 11,250*l.* In September, 1813, Mr. Stringer sold 1,000*l.* Consols, and in September, 1816, *he sold a further sum of 400*l.*; but between the beginning of January, 1817, and the end of July, 1819, he purchased five sums of Consols, making together 550*l.*; and as the result of the above transactions the sum of 10,400*l.* Consols was standing in the name of the testator, Mr. Stringer, on the day of his decease.

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Mrs. Rebecca Stringer, on the 3rd of February, 1823, transferred into the name of Dr. Stringer, the son, the sum of 3,338*l.* 6*s.* 8*d.*, Consols. On the 6th of March, 1823, she transferred the sum of 6,666*l.* 13*s.* 4*d.* Consols into the names of Peter Locke and Joshua Sutting Crossley (named as trustees of Mrs. Stringer's will), but no declaration of the trusts of this sum of 6,666*l.* 13*s.* 4*d.* Consols was ever executed by the trustees. During the joint lives of Mrs. Stringer and Mr. Cuming, the trustees paid the dividends of the 6,666*l.* 13*s.* 4*d.* Consols to them in moieties.

On the 3rd of June, 1823, a further sum of 856*l.* 8*s.* 9*d.* Consols was transferred to Mrs. Rebecca Stringer as executrix of her husband, in respect of the testator's claim upon Sir Charles Booth's estate, by the Accountant-General pursuant to an order made in *Walter v. Maunde*.

After the death of Mrs. Rebecca Stringer, in January, 1832, the then surviving trustee, Mr. Peter Locke, in February, 1832, transferred 1,666*l.* 13*s.* 4*d.* Consols, part of the above sum of 6,666*l.* 13*s.* 4*d.* Consols (being one-fourth part thereof), into the name of Dr. Stringer, the son. In March, 1832, the defendant Mr. George Browne, on the request of Mr. Cuming, consented to act as a trustee with Mr. Locke, and the 5,000*l.* Consols were transferred into their joint names, but no declaration of trust was ever executed. Mr. Locke died, and Mr. Browne became and continued to be the sole trustee. The dividends of the 5,000*l.* Consols were paid to Mr. Cuming until his death in July, 1851.

Under these circumstances, the plaintiff Mr. Clark, by his bill against Mr. Browne, the surviving trustee, in whose *name the 5,000*l.* Consols stood, and against Mrs. Newling as representative

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of Dr. Stringer, prayed a declaration that the plaintiff was entitled to the 5,000*l.* Consols and the dividends thereon since the death of Mr. Cuming.

The defendant, Mrs. Newling, claimed to be entitled to the whole of the 5,000*l.* Consols, and the arrears of dividends since July, 1851.

Mr. Bacon and *Mr. Speed* [contended that the gift was adeemed, and cited *Fryer v. Morris* (1), *Humphreys v. Humphreys* (2), *Barker v. Rayner* (3), *Stanley v. Potter* (4), *Gardner v. Hatton* (5), and other cases].

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Mr. Malins and *Mr. Jolliffe* appeared for the defendant Browne, the trustee.

Mr. Elmsley and *Mr. Piggott* appeared for the defendant, Mrs. Newling.

The counsel for the defendants were not heard.

THE VICE-CHANCELLOR :

This plaintiff, who claims upon the principle of a resulting trust, has not satisfied me of his title. He says, that there was a specific legacy of a claim which the testator Thomas Stringer had against the estate of Sir Charles Booth, which was adeemed except as to an inconsiderable part.

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There is no doubt on the doctrine of ademption, that, if the legacy be a specific debt, and if, after making the will, the testator receives the amount so as to extinguish the *debt, there is nothing upon which the words of the gift can operate.

If this were the case of a specific bequest of that kind, the plaintiff's case, as to ademption *pro tanto*, would be well founded. But the Court must look carefully to see whether the bequest is or is not made in terms so comprehensive, that, although the testator may in his lifetime have received satisfaction of the claim, the gift may extend to the fund in its altered state.

Sir JOHN LEACH, in the case of *Barker v. Rayner* (6), adverted to a principle derived from the civil law (7), that where a testator sets apart a specific fund received by him in order that it may

(1) 7 R. R. 222 (9 Ves. 360).

(2) 19 R. R. 225 (2 Cox, 185).

(3) 26 R. R. 18 (5 Madd. 208).

(4) 2 R. R. 26 (2 Cox, 180).

(5) 38 R. R. 85 (6 Sim. 93).

(6) 26 R. R. 18 (2 Russ. 122).

(7) Instit. lib. ii. tit. 20, s. 12.

be applied for the benefit of the legatee, the principle of ademption or extinction does not apply.

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The words of the will give "one third part of the amount of whatever sum or sums of money may arise and be received from the testator's claim and demand on the estate and effects of the late Sir Charles Booth, deceased."

If the sums received by the testator under the orders of this Court had been mixed with the general mass of his property, there would have been more room for the argument in favour of extinction and ademption. But so far from thus mixing the amount received, he invested that amount as a separate fund in 3l. per Cent. stock. It is a singular circumstance that he sold out small parts of this stock, and as to part of what he had sold out he repurchased stock; but it is certain that there remained at the time of his death the amount of stock originally invested, after deducting the small sums sold, but increased by the reinvestments which I have mentioned.

The benefit intended for the legatees was, according to *his language, the amount which might be recovered in respect of his claim.

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One view of the case is, that it was a pecuniary legacy, the amount to be demonstrated by reference to a sum to be realised from a particular fund. If that be a correct view, the doctrine of ademption could not apply. But the appropriation by the testator of the amount received, so as to keep it separate from the rest of his estate, stamps upon the sum which is found thus appropriated a specific character as the fund destined by him to satisfy the bequest.

The principle of the civil law to which Sir JOHN LEACH alludes in *Barker v. Rayner*, has regard to the act of the testator in dealing with a specific subject, so as to preserve it for the legatees. That principle seems to me still more strongly to apply to this case, for there is little doubt as to what was the meaning of the testator as to the fund in the state in which it stood at the time of his death.

The strict construction of the testator's language makes it not a gift of the debt *quà* debt, but of the sum of money produced when the debt was recovered and ceased to exist as a debt. This goes to show that the testator contemplated the recovery of the debt in his own lifetime, when the subject of the gift could not be the debt itself, but the amount recovered in respect of it.

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Moreover, I cannot doubt that the executrix acted substantially upon the understanding, that the stock in which the testator had invested what he had recovered from the estate of Sir Charles Booth, or so much as remained at the time of his death, was really the subject of the gift in the will. For a period of thirty-two years, since the death of the testator, the stock has been standing in the name of a trustee, who, by a mesne act and not by a direct act of Mrs. Stringer, has been in possession of it for a number of years, and still holds it upon the title of the person who would have enjoyed it if it had been included in the gift in Mrs. *Stringer's will. He received the proceeds of the stock during this length of time up to the year 1851, and applied them to purposes quite consistent with the bequest.

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The plaintiff now asserts, by this bill, a title to the fund in the hands of the trustee, on the ground that the legacy was adeemed, and upon the footing of a resulting trust.

Being claimed as a resulting trust, such a claim is liable to be rebutted by evidence ; and here the evidence of the acts of the testator and the course of dealing with the fund go to rebut the resulting trust, and to fasten upon the fund that character in which it is claimed by the legatee and impressed with a trust for his benefit.

The bill must be dismissed, but without costs.

Another cause of *Newling v. Browne* then came on to be heard, in which Mrs. Newling claimed the 5,000*l.* ; and a decree was made in that suit, giving the whole fund, with the arrears of dividends, to Mrs. Newling.

1854.
March 27.

BAKER v. BRADLEY.

(2 Sm. & G. 531—563.)

[Affirmed on appeal as reported in 7 D. M. & G. 597.]

1854.
Dec. 4, 5, 6, 7.
1855.
Feb. 24.

MORRISON v. MORRISON.

(2 Sm. & G. 564—578.)

[This case is reported on appeal in 7 D. M. & G. 214.]

IN RE THARP (1).

(2 Sm. & G. 578—583.)

A consignee of West India estates, appointed by the COURT, has a right to be reimbursed his expenditure out of the rents of the English estates of the same owners, although the consignee is not the receiver of these estates.

[This judgment, referred to in the preceding case of *Morrison v. Morrison*, is printed in 2 Sm. & G. from a short-hand note: it therefore has not, strictly speaking, the authority of a report vouched for by a member of the Bar: nor is it clear how far it can be relied on, see the comment of Pearson, J. cited in the note.—F. P.]

1852.
June 2.
—
Lord St.
LEONARDS,
L. C.
[578]

THE LORD CHANCELLOR (LORD ST. LEONARDS) :

I have already stated that I do not mean to decide any question in this matter at present, and that it will be necessary that this matter should be argued with reference to the different questions, very deliberately, before the Court. In throwing out what my present impression is, with a view to assist the counsel in the future argument of the case, I will just point out what presses upon my mind.

The first question is this : It is contended for the merchants, the consignees, that they have now a charge upon the *corpus* of the estate, upon the inheritance of the estate of which the lunatic is only tenant for life, for the whole amount of their claim of some 200,000*l.* or 300,000*l.* Now I think it is impossible to make out that charge at present, in the way in which it is endeavoured to be sustained : that I think quite impossible. But there has been a prevailing impression in the profession, that the consignee's charges upon a West India estate stand upon a different footing to the common charges in this country. That is undeniable, and the difference between the estates accounts for it.

In Ireland, it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage money : Where a leasehold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody : this payment is what is called *salvage money. That is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anybody beyond the charge, it is acquired by that payment, in the shape of redemption money. Now it must be upon some such

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THARP.

principle that this claim is to be maintained in any way. The claim would seem rather to attach only as regards the compensation money for the slaves, because, as the estate is represented as of no value, but on the contrary amounting to a yearly loss of 2,500*l.*, it would be difficult to say that any large sum is to be paid in respect of saving that which happens to be destroyed. But as regards the compensation money for the slaves, without the large expenditure made for the supply of those slaves and their maintenance for the cultivation of the estate, those slaves could not have continued to exist up to the time of redemption by the great grant of 20,000,000*l.* by the people of this country, to redeem slaves from a state of slavery. And if therefore the money which represents the slaves was the produce of that expenditure, which must depend upon very elaborate inquiries and considerations, then to that extent the monies expended by the merchants might be considered as salvage money which had produced those slaves, which slaves had been liberated or redeemed with that money which now represents them in this Court, and to that extent the charge may perhaps be established.

I apprehend that, generally speaking, with reference to the equity of West India estates, it could hardly ever have gone beyond this, as I said in the course of the argument, that, where consignees were supplying the estate as they ought to do, sending out all the supplies, all the machinery, all the clothing, all the food in point of fact, except what was found in the place itself, and were receiving back, as they did, all the produce of the estate, except what was sold, the common portions of it sold in the island, and keeping the accounts as they did, and charging their commission, there then was a balance on their accounts, which in the case of a tenant for life would not have properly gone to the tenant for life, until their account was cleared, and they could not and ought not to have allowed the tenant for life to have received any portion of these profits, if they were dealing with a tenant for life, until their account was paid; and if in that case, after the tenancy for life, it turned out there was still a balance due, and that balance had been properly incurred in maintaining the estate, then it might properly be represented as money laid out for the benefit of the inheritance; and therefore that balance at that period ought to be a charge on the tenancy in remainder of the estate. That, one could understand; but as to a general charge on the inheritance by the mere circumstance of merchants acting for a tenant for life, and not consulting the remaindermen, though they may have

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been parties to a cause in which an order may have been *made for the appointment of those consignees, as to every shilling of the expenditure being a charge on the inheritance (I am speaking as at present advised, not binding myself to anything) that is an extent of argument to which I cannot at all go.

The first thing to be done on this account, with a view to its rectification, in its bearing on the different parties, would be to divide it into different portions, and the first portion which must be clearly cut off and stand on its own footing, is that portion which is represented, as it is said, but it does not matter what the sum is, to have amounted to 230,000*l.*, and to have been added as a debt on the part of the consignees by the policies of assurance. Now, the policies of assurance, beyond all doubt, were effected at the expense of the life estate, which at this moment I will not consider; but whether the merchants were entitled to have those policies kept on foot out of the life estate, is a question to be considered; but they could have no pretence to have had the policies at all, except by the order of the Great Seal. They could not of course have effected policies, and thrown the expense on the estate even of the tenant for life, and therefore we must look to the order of this Court, acting under the Sign Manual, to see what authority was given, and what the Court meant to do in that respect.

Now, the Court made an order which I cannot possibly approve of, that is, it made an order for the payment ultimately of the expense of these policies, and of the rents of the English as well as West India estates, but reserving the question, whether the rents of the English estates, as I understand it, ought to have been so applied. That is a very mischievous order. The Court ought to have addressed itself, as I apprehend, speaking with submission, to the duty of deciding at the time, whether or not the fund was properly applicable. To postpone that duty would only tend to introduce difficulties, which afterwards do so complicate a case that no human power can deal with it. By disposing of the points as they arise, the case ultimately presents no real difficulty.

Now that question involves this, whether or not the consignees are entitled to the benefit of the whole produce of the estate in discharge of their demand. They were consignees only of the West India estates, and they were not receivers of the English estates; but there being a debt now represented by some hundreds of thousands of pounds, the question is, whether the English estates of the tenant for life are, or are not, responsible for that debt. I have

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already said, and I repeat it to prevent any misunderstanding, that I am deciding nothing, but it strikes me that the English estates are liable, because, supposing the tenant for life in any ordinary case had estates of these two sorts, and he employs a man as a receiver of one of them, what would be the result? Why, that, whatever is the profit of the estate, he takes whatever is the loss on the account *of the receiver, he acting as his agent, and under his authority, in respect of the one estate, he must bear out of his general estate, it is a debt as against him. Then, when the Great Seal takes possession of both the estates of the lunatic, and appoints a man a committee of the one estate, does it not act as the tenant for life himself would have acted, if sane, and does it not incur the same liability, as representing the lunatic's estate generally, as the lunatic, if sane, would have incurred in respect of all his property? I cannot therefore at this moment see, looking at it now, on what principle it can be contended that all the estates of the lunatic, to the extent of his life interest, are not bound by the debt which is incurred in respect of the Jamaica estate alone. Suppose no man would have taken the appointment of consignee, and that the Court had been forced to act itself as if it were the owner; what must the Court have done? The Court must have done the very act which the consignee did. It might have bought the supplies in the market here, it must have sent them out just as the consignees did, and have sent them to the West Indies, where they would have been in effect swallowed up and destroyed, as they have been under the management of the consignees, not from any fault of the consignees, but from the unhappy condition, through change of circumstances, of West India estates. Well, then, in that state of things the same result would have happened; that is, that the debts so incurred by the Great Seal itself must have come out of the general assets of the tenant for life. I apprehend, therefore, that that will ultimately be the view which whoever has to decide the case must take.

Now to come back to the policies. They have been effected out of the life estate of the lunatic. They belong to the lunatic's life estate and to nobody else, subject to this charge. If this charge is to be considered as a charge on the inheritance, which I think it cannot, and if the tenant for life is to contribute his proportion, which he must, and if this proportion did not go beyond that which was expended on the policies, it may then turn out that the policies would belong to the persons entitled in remainder, they would go certainly in ease of the debt; and if the debt were relieved to that

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extent, that would be a relief to the persons in remainder, supposing them to be liable to the debt itself. Now these policies, belonging to the life interest, as I must take it at present, must be dealt with in a lunacy on a separate ground. If the circumstances of the lunatic's life estate would permit them to be kept up, and at the same time leave sufficient provision for the lunatic's maintenance, and also leave a sufficient security for the merchants' debt, then it would be proper to keep them up after they had been so long maintained; but if it should turn out, on consideration, that the keeping them up would only go on increasing the debt in a much greater ratio than any sum received can ever pay, then it may become a very great consideration whether *those policies should not now be sold, and the money at once applied in redemption, as far as it will go, of the merchants' demand. That is, I think, one great question to be ascertained; and if those questions as to the liability of the life estate, and as to the propriety of keeping up the policies were decided, then a good deal of difficulty would be removed from this case. But then there is this very important consideration,—what is to be done with these West India estates? The merchants represent they will no longer continue as consignees. I cannot bind them to continue as such. Then what is to be done? I am stating that which is not denied, that every year's account latterly shows, instead of a gain, a loss of 2,500*l.* a year. I cannot possibly allow that loss to go on adding a debt that never can be paid as against the lunatic's life estate, or even as against those in remainder; and the remaindermen sit by here,—probably they will become a little more active when they consider the real state of their affairs,—but they sit by here on this occasion, and say, We have no concern with it; it is with the tenant for life. Do what you will. I do what I will, and what I ought to do, and what I shall do, if I am driven to it. I shall direct the West India estates to be abandoned or thrown up, if they cannot be sold. I will sell the life interest, if I can sell it, and discharge the debt under the Act, if it can be done; if not, it must be abandoned, thrown out of cultivation, and let what can, be done. Then the remaindermen will have to consider what position they are in. That will introduce simply this question, Is the estate worth preserving or not? If it be worth preserving, then all persons interested, the tenant for life, the lunatic, and this Court which represents the lunatic, acting of course fairly between all parties, and tenant for life in remainder, who may become entitled if there

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is no issue, in short, all persons having an interest in this property, if worth preserving, must seriously address themselves to the consideration of the question,—Is the estate worth preserving? or they will find that the estate will suddenly be abandoned, and will be lost to them, as well as to the tenant for life.

If that is so, I shall have to consider ultimately what is to be done in regard to the payment to the merchants. I should certainly give them the means of payment, so far as the policies afford, if it be demanded by sale of those policies. Then if they are entitled, as I should apprehend rather at present they are, to the whole of the life estate, I should, as far as that life estate extends, be compelled to consider, what would be most painful for me to carry into execution, whether the allowance to the lunatic ought not to be reduced; for anxious as I always am, and always shall be, to do everything that is proper to be done for the proper maintenance of the lunatic, according to his station, under the care of the Court, yet I am bound to see that the interest of the honest creditor, whose debt has been created for the benefit of the estate, and the lunatic, under the *direction of the Great Seal, is not neglected, but must be duly provided for out of the life estate, if the life estate only be subject to the debt. If that shall turn out to be the case, therefore, I must consider whether that amount of 3,000*l.* and odd can be continued to this gentleman, and I must appropriate the whole of the remaining income of the life estate. I am assuming always it is liable, not deciding, that I shall be compelled to appropriate the whole remaining interest to the extension (1) of the debt. It might be a question, whether even the life estate should not be sold. If it could be sold under the Act of Parliament, that would be another question which I do not touch. The result, therefore, really is, that this is a case in which the parties may, by coming to some reasonable understanding between themselves upon some of these questions, save themselves from very great loss; but they will determine that for themselves, and consider for themselves what they had best do; in the meantime, I shall direct this case to stand for the first day after Term, and to be regularly argued by the different parties on the points of law to which I have now adverted. I shall request that as much care as possible may be taken by the counsel, which I know they will willingly do, as to the consideration of so difficult a case, and that they will assist the Court to the utmost of their power, (and I know I need not ask in vain) in the consideration of the question, with a view to its ultimate decision.

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(1) *Qu. extinction.*

THORP *v.* OWEN.

(2 Sm. & G. (App.) i—ii.)

1854.
Feb. 10.

The COURT, having ordered certain small leaseholds to be sold and the proceeds distributed, together with a fund in Court, among numerous parties upon the certificate of the chief clerk, in order to save expense, directed the purchasers to be served with a summons to show cause at chambers why the proceeds should not be distributed pursuant to the order; and no cause having been shown, the proceeds were distributed by the chief clerk.

LEATHERT *v.* THORNE.

(2 Sm. & G. (App.) ii.)

1854.
Feb. 25.

[A similar order was made in this case.]

HEWETSON *v.* TODHUNTER.

(2 Sm. & G. (App.) ii.)

1854.
Feb. 24.

It is not enough, to identify a document, that it should be inseparably connected with, and referred to as so connected in, the affidavit. The document must be impressed with some mark to which the affidavit refers.

EMPSON *v.* BOWLEY.

(2 Sm. & G. (App.) iii—iv.)

1854.
Feb. 24.

[Obsolete practice as to enlarging time for delivery of interrogatories.]

SCHWABACHER *v.* BECKER.

(2 Sm. & G. (App.) iv.)

1854.
March 28.

On a motion that a fund standing to the separate account of a married woman, a foreigner, domiciled abroad, should be paid to her husband, upon affidavit that there was no settlement, and that, by the law of the country where the parties were domiciled, the husband was entitled to the fund, the COURT refused to make the order without the consent of the wife, taken by commission or on examination.

IN RE THE TRUSTS OF THE WILL OF DAVID BAXTER.

(2 Sm. & G. (App.) v.)

1854.
April 24.

[An order in this case was made on the authority of *Ex parte Russell*, 89 R. R. 139 (1 Sim. N. S. 404).]

IN RE WEBSTER'S SETTLED ESTATES.

1854.
April 24.
—

(2 Sm. & G. (App.) vi—vii.)

[Obsolete practice.]

DALE v. HAYES.

1854.
April 27.
—

(2 Sm. & G. (App.) vii.)

[Obsolete practice.]

ROTHERHAM v. BATTSON.

(2 Sm. & G. (App.) viii.)

1854.
June 1.
—
STUART,
V.-C.
[App. viii]

In a bill filed by a married woman to administer the estate of a testator, and to establish her equity to a settlement, to which her husband and his assignees in bankruptcy were made defendants, the COURT held the husband was entitled to his costs, but refused to give the assignees their costs.

THE bill was filed by a married woman, to administer the estate of a testator, and it prayed, that the property given to her under the will might be settled upon the plaintiff and her children. The bill was filed against the executor of the testator, and against the husband of the plaintiff and his assignees in bankruptcy.

It appeared that Henry Rotherham, the husband, was a debtor to the estate in a sum of 400*l*. He subsequently became bankrupt, and assignees were appointed under the commission.

Mr. Bacon and *Mr. Hislop Clarke* appeared for the plaintiff.

Mr. Wigram and *Mr. Tapping* appeared for the executor, and contended, that, the plaintiff's husband being a debtor to the estate, the amount of his debt should be deducted from the share of the wife in the residuary estate of the testator; at all events, the Court would not give the husband his costs, which would in effect be giving him two sets of costs.

Mr. De Longueville Giffard, for the assignees, claimed to have a moiety of the fund, or at least such portion as the Court should think fit, paid to the assignees.

THE VICE-CHANCELLOR said, that, as the husband had, it appeared, received a portion of the estate in which his wife was interested, he should direct a settlement to be made of the whole of her share; and as the husband was a debtor to the estate, he should give no costs to his assignees. With regard to the costs of the husband,

his Honour said, that, as by a rule of the Court the plaintiff could not associate her husband with herself as co-plaintiff, he was necessarily made a defendant. Then, it was contended, that, the husband being a debtor to the estate, he ought not to be allowed his costs, or at least that he ought to be allowed only to deduct them from his debt. But the husband was before the Court only in his character of husband, and not as debtor. It was the duty of his assignees to answer all demands on which the husband was originally liable, and his whole estate was vested in them. He thought, therefore, that the husband was entitled to his costs.

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v.
BATTSON.

IN THE QUEEN'S BENCH.

MACLAE v. SUTHERLAND.

1854.
Jan. 12.

[1]

(3 EL. & BL. 1—47; S. C. 2 C. L. R. 1320; 23 L. J. Q. B. 229; 18 Jur. 942;
22 L. T. O. S. 254.)

The directors of an unincorporated and unregistered joint stock Banking Company, called the R. Bank of A., made and issued promissory notes in this form:

“R. Bank

“We, directors of the R. Bank of A., for ourselves and the other shareholders of the said Company, jointly and severally promise to pay,” “for value received on account of the Company.” (Signed) “A., Chairman; B. and C., Directors.”

of A.”

Held that, assuming that the parties signing were authorized to sign promissory notes on account of the partnership, this form of note showed sufficiently an intention to bind the partnership jointly; and that, though the attempt to bind the shareholders severally was *ultra vires*, and void, yet the shareholders were bound jointly.

An action was brought on the notes: they were at five years' date; attached to each were coupons for half yearly interest at the rate of 5 per cent. till the principal sum would become due. They were issued through a broker, employed by the directors; and the plaintiffs paid him the full value. In the advice notes from the broker to the plaintiffs, the transaction was called a sale of debentures. The money thus raised was employed as capital, in starting branches of the Bank abroad. These facts being stated in a case, in which the Court had power to draw inferences of fact:

Held: that, though the transaction was called “a sale of debentures,” yet it appeared to be in substance a loan on the security of the notes; and that, assuming that the directors had authority to borrow it for the partnership, the plaintiffs might recover against the shareholders for money lent.

Held also: that the transaction appeared to be so much out of the ordinary course of banking transactions that the plaintiffs could not recover, merely on the implied authority given to the managers of a joint stock Company to do all that was in the ordinary course of the business for which the Company was formed.

The deed of the Company authorized the establishment of branches of the Bank in all places east of the Cape of Good Hope, and gave very full powers to the directors to manage the whole concern. It also provided that, for the first four years, there should be no general meetings. It appeared that, in fact, the money raised on the notes was employed in establishing branches; that, during the first four years, dividends were paid by the directors; and that afterwards, at three successive general annual meetings, dividends were voted, on the supposition that they were derived from the profits of these branches and received by the shareholders.

Held: that the deed authorized the directors to issue notes, and borrow money, as they had done, for the purpose of starting the branches.

Held also that, supposing it had not, the shareholders must, as an inference of fact, be taken to have ratified the means by which the directors had raised the capital for establishing the branches from which the dividends were derived: it appearing to the Court as a fact that they must have known that the capital was borrowed.

ASSUMPSIT. First count by plaintiffs as holders of a promissory note, dated on 1st August, 1846, made *by the defendants, and

[* 2]

payable to John Henry Wray or bearer at the Union Bank of London, on 1st August, 1851. Averments of presentment, and of non-payment. Second, third and fourth counts on other promissory notes. Fifth count for money lent, interest, and on an account stated.

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The defendants severed in their pleadings.

Pleas by defendant Sutherland, to each of the first four counts :
1. *Non fecit*. 2. That plaintiffs were not the holders. And, 3, a denial of the presentment. To the fifth count, *Non assumpsit*. Issues thereon.

There were similar pleadings by the defendant Connell, and by the other four defendants, who pleaded jointly.

On the trial, before Lord Campbell, Ch. J., at the sittings at Guildhall after Trinity Term, 1852, a verdict was taken for the plaintiffs, subject to a case, the substance of the more material parts of which is here stated.

The action was brought to recover the amount of four instruments, with interest. The following is a copy of the first.

[3]

“ The Royal Bank

200*l*.

200*l*.

(27*s*)

LONDON, 1st August, 1846.

We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said Company, jointly and severally promise to pay to George Henry Wray, or bearer, on the first day of August one thousand eight hundred and fifty-one, at the Union Bank of London, the sum of two hundred pounds, for value received on account of the Company.

Entered
BENJAMIN WOOD,
Secretary.

J. W. SUTHERLAND, Chairman.
ADAM DUFF,
JOHN MITCHELL, } Directors.

of Australia.”

All of the above document was engraved, except the date, the number, and the signatures of the chairman, directors and secretary.

The second and third were precisely similar. The fourth was dated 10th August, 1846, and payable 10th August, 1851, and was for 1,000*l*. In other respects it resembled the first.

Annexed to each of the instruments, and on the same sheet of paper, were other instruments, called coupons, payable at successive periods of half a year subsequent to the dates of those instruments respectively, until the sums in the said instruments mentioned

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should become payable, the sums mentioned in those coupons being respectively an amount equal to half a year's interest, at five per cent. per annum, on the sums mentioned in the respective instruments, which coupons were signed by *the same persons respectively who signed the said instruments. The interest sought to be recovered was that upon the four instruments, and also the arrears due upon the coupons.

The plaintiffs are the trustees of the marriage settlement of Major and Mrs. Brown, and became the holders of the instruments in question under the circumstances after mentioned. The defendants Sutherland and Connell were directors of a joint stock Banking Company, called "The Royal Bank of Australia," at the time of the making of the said instruments, and continued and were such directors at the time when the plaintiffs became holders of the instruments sued upon, in manner hereinafter mentioned; and the other defendants were during the same periods shareholders. Wray was the manager of the Bank until its stoppage.

The case stated at length the preliminary meetings of the persons forming the Company. These were ratified by a clause in the deed of settlement of the Company subsequently executed; but nothing material turned upon them.

A deed of settlement of the Company, dated the 3rd August, 1840, was executed shortly after its date by all the defendants, and various other persons. A copy of the deed was made part of the case (1).

[4, n.]
[*5, n.]

(1) The deed recited that the several parties thereto agreed to form a joint stock Company for the purpose of carrying on the trade or business of banking under the name or style of the Royal Bank of Australia; and the parties entered into covenants which (as is usual in such deeds) were numbered. The first declared that the name of the firm should be the Royal Bank of Australia. The following are the more important clauses:

6. "That the Court of Directors shall have full power and authority to carry on the business of the Company in the city of London and in such other cities, towns or places within the United Kingdom, or within her Majesty's colonies or settlements of New South Wales, Van Diemen's Land, Western Australia, Southern

Australia, or any other part of New Holland,*or within the islands of New Zealand, or within the territories of the Honourable the East India Company, or within the colony of the Cape of Good Hope, or within any other islands, countries, or territories to which her Majesty's subjects may lawfully trade beyond the Cape of Good Hope to the Straits of Magellan, which to the court of directors may seem advisable: but the principal office of the Company shall at all times be in the city of London."

9. "That the trade or business of the Company shall be that of bankers or of banking, including the making and issuing of bank notes, and bills payable on demand, after sight, after date, or otherwise, and the making of loans and advances to customers and other persons, on open and current

In August, 1840, the directors authorized the establishment of branches of the Bank in Australia, the one *at Sydney being the

accounts, on real or personal estate, on choses in action or in equity, on bonds, covenants, or other personal security, on inland or foreign bills of exchange, or promissory notes, on letters of credit, on bills, on the deposit of bills of lading, dock warrants, or other muniments of title to goods, wares, or merchandises, on ships' bottomries, on lands and tenements, on sheep, cattle, and live stock, on wool, farm stock and produce, and on all and every other kind and description of property whatsoever, and including the discounting of inland or foreign bills of exchange or promissory notes, payable at or after sight, after date, or on demand, and including the borrowing or taking up money at interest on receipts, on inland or foreign bills of exchange or promissory notes, bonds, debentures, deposit receipts, or other obligations, as shall from time to time be deemed expedient, and including the keeping of the money or cash of individuals or other persons at interest or otherwise, and including the dealing in bullion, coins, specie, money, notes, bills, and other securities for money, and including purchased investments, dealings, sales, or advances in or upon the Government or public funds of Great Britain or Ireland, navy bills, Exchequer bills, India bonds, turnpike bonds, the bonds, bills, or securities of any body of Commissioners authorized by Act of Parliament, or charter of the Crown, to borrow money on bonds, bills, or securities, the bonds, bills, or securities of any Company authorized by Act of Parliament or charter of the Crown to borrow money on bonds, bills or securities, the bonds, bills, stock, promissory notes, debentures, engagements, or other securities of any British colonial Government, of the East India Company, of the Bank of England, or of the Bank of Ireland, or of any of the Banks of England, Scotland or Ireland, or other joint stock Company, whether established

by charter, letters patent, Act of Parliament, deed of settlement, or otherwise formed or constituted, or of any foreign or colonial Bank, or other joint stock Company, shares in the Company hereby established, shares in any other joint stock Banks carrying on business in the United Kingdom, the colonies *or elsewhere, shares in or stock of any other joint stock Company or society, or of an annuity or annuities for one or more life or lives, or of any other description; or the stock or funds of any public foreign Government or State, or of the stock or shares of or in any foreign public Company, or in, upon, or of any freehold, copyhold or leasehold estates, in the United Kingdom, the colonies and dependencies thereof, or elsewhere, or any securities affecting any such freehold, copyhold or leasehold estates, or in, upon or of any other properties, stocks, funds or securities which the court of directors shall consider proper and approve of, with power to the court of directors to call in, convert into money, reinvest, and vary, such investments, property, stocks, funds, securities and moneys, as occasion may require, and as the court of directors shall think proper. . . ."

10. "That the management of the Company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities and moneys for the time being, belonging to the Company, and the regulation and determination of the modes and terms of carrying on and transacting the business of the Company, and all other matters and things whatsoever connected with or relating to the business and concerns of the Company, shall be solely and exclusively vested and reposed in the court of directors, except as herein is excepted or otherwise provided." * * *

15. "That the general business of the Company shall be carried on in the names of such trustees as shall be

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[*6, n.]

[7, n.]

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[8, n.]

[*9, n.]

principal one. The rate of interest in Australia in 1840 was understood to be from 12 to *15 per cent.; and the business of dealing

appointed for that purpose by the court of directors, under the designation of the trustees of the Royal Bank of Australia, or under any other designation the court of directors shall think fit; and all contracts, securities, estates and effects which shall be entered into, and taken or given on behalf of the Company, shall be entered into, and taken or given by the said last-mentioned trustees, unless the court of directors shall have given express directions to the contrary, and all contracts, securities, estates and effects, which shall be entered into and taken or given by the said last-mentioned trustees, shall and may be entered into and taken or given by them in their own names, or by reference to their designation of trustees as aforesaid, as the court of directors shall direct; and all suits at law, or in equity, and all prosecutions with respect to any of the properties, funds, securities or moneys belonging or entrusted to the Company, or in which they may have any interest, shall be carried on in the names of the trustees of such properties, funds, securities or moneys; and the several trustees, so to be appointed as aforesaid, shall be continued only during the pleasure of the court of directors, and shall be removable at any time by the court of directors."

22. "That the properties, funds, securities and moneys hereinbefore authorized to be taken and purchased in the names of trustees, and all moneys to be received or become due thereon, or to arise from the sale, disposition or conversion thereof shall, from time to time, be under the sole controul, and subject to the order and disposition of the court of directors; and the resolution or order in writing of the court of directors shall be obligatory on, and be a justification to, the said trustees and any attorney or attorneys who shall be appointed by and under them, as aforesaid, as to any conveyance, assignment, pur-

chase, sale, investment, payment, or other disposition whatsoever, of the properties, funds, securities or moneys, to which such order shall relate. . . ."

30. "That the court of directors shall and may make all such rules and regulations, and the trustees and the court of directors shall and may give to the manager, or any other persons in the employ of the Company, all such powers, in regard to signing, drawing, accepting and indorsing bills of exchange, promissory notes and other negotiable securities, and signing orders and receipts on the account of the Company, and in regard to the management of the business of the Company and the disposition of the properties, funds, securities and moneys of the Company, as the court of directors shall think expedient and proper; and no bill, note, or other negotiable security, signed, drawn, accepted or indorsed, or order or receipt *signed in any other manner than by the person or persons respectively authorized in that behalf as aforesaid, shall be binding on the Company. . . ."

43. "That the court of directors may issue, at any of the offices or banking houses where the business of the Company shall be carried on, any notes or bills payable after date, after sight, on demand, or otherwise, which it shall be lawful or competent for the Company to issue under or consistently with the laws for the time being in force in relation to bankers or Banking Companies, and may enter into compositions with the Commissioners of Stamps for the duties (if any) payable in respect of any such notes and bills, and may cause such bonds and securities to be given and entered into by sureties on behalf of the Company for the payment of such duties or otherwise, as shall be required; and such sureties shall be indemnified in regard thereto by and out of the properties, funds, securities, or moneys of the Company."

in exchanges was at that time considered a profitable business. The *proceedings of the directors were transacted at courts at which the prescribed number of directors attended. *The case, after stating this in substance, then proceeded.

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“The total number of shares allotted otherwise than to the directors as hereinafter mentioned were 4,501, which were divided amongst a proprietary of about 150 persons, the generality of whom held but a small number of shares. Upon these 4,501 shares two deposits, one of 2*l.* per share paid by the shareholders on applying for shares, and another of 3*l.* per share paid on their receiving such shares, which two deposits are for convenience hereafter called the first call of 5*l.*, and amounting in the aggregate to 22,505*l.*, were duly paid prior to the subscription of the deed of settlement by the shareholders; and a second call of 5*l.* per share was afterwards made on the 20th of January, 1841, and became payable on the 31st of March, 1841, and was duly paid in respect of the above mentioned 4,501 shares at or about the time when it became due: and no further call was made until the 1st November, 1847, when a third call of 5*l.* was made, payable on the 25th of the same month. In the above 4,501 shares there was only included, as taken and paid upon by the directors, 20 shares each, being the number which would qualify them as directors under the deed of settlement; but, in addition to the qualification so taken and paid upon,” the case then showed that the directors took, in different proportions, 8,400 shares, on which they did not pay up their calls, but gave promissory notes for the amount, which in the end were only partially realised. The case then proceeded. “On the 31st of March, 1841, the paid up capital of the Company, independently of the notes so given by the directors, was represented by 4,501 shares with 10*l.* per share, being the said first and second 5*l.* calls paid up, amounting to 45,000*l.* Up to the 31st of December, *1841, the items charged to preliminary expenses against the Company in the said books amount to 12,177*l.*”

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An account, taken from the ledger of the Company, set out in this part of the case, showed the whole of the business transactions down to the 30th of November, 1841, and contained nothing but banking transactions, which were on a small scale, the whole amount of the debit side in the year 1841 being under 7,000*l.*

“Up to the last mentioned date, 30th November, 1841, no losses had been incurred by or on behalf of the Bank; nor debts.

“The directors from time to time took up large sums at interest

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on instruments with coupons attached in the same form as those above mentioned and described. These sums were sent out to Sydney chiefly in bills of exchange, for the purpose of being employed under the superintendence of Mr. Benjamin Boyd and Mr. Robinson, two of the directors, the former being the chairman, who went out at the end of 1841, as after mentioned, for the purpose of superintending the transactions of the Bank in Australia generally, and in whom, particularly the said Benjamin Boyd, the directors in England, for a long time, reposed the most implicit confidence."

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"Some portion of the sums raised was taken up through the means of Messrs. B. and M. Boyd, and some through the means of Robert Allan, an agent in Scotland, whose appointment was confirmed by the directors' minute of the 7th October, 1840: Appendix (1). The directors had an account with Messrs. B. and M. Boyd, which included the instruments issued through *them. Allan generally accounted for the sums received by him to Messrs. B. and M. Boyd, who included these sums in their account with the directors, but occasionally accounted directly with the directors, but was treated more as the agent of the Boyds than of the directors. He always accounted either to Messrs. B. and M. Boyd or to the directors.

"The same form of instrument, with necessary variations as to dates, amounts and signatures, was always used.

"Frequently, instead of receiving cash for the said instruments, the directors received acceptances of Banks and joint stock Companies at long dates, but always for the same amount as the said instruments. These acceptances were considered by the directors as more advantageous for banking purposes than cash."

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"On 4th November, 1840, the said Allan sent to the directors the letter set out in the Appendix (1), requesting to be furnished with a copy of the Bank contract. The directors, on the 11th November, 1840, passed the resolution which appears by the minute in the Appendix (1). An abstract of the deed of *settlement was sent accordingly, with a copy of the signatures."

(1) The following parts of minutes and documents set out in the Appendix to the case have a bearing on this part of the case. "At a meeting of the Royal Bank of Australia, held on Monday, 17th of August, 1840—

Present," &c. "A proof of the debenture or deposit note, the form of which had been previously agreed to by the board, was submitted and approved."

"At a meeting of the Royal Bank

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The case gave the particulars of the instruments issued previously to August, 1841, amounting in the whole to 174,002*l.* 10*s.*, which were issued in exchange *for securities, most of which were ultimately realised; and proceeded. * * *

"During the years 1842 and 1843 the amounts of such instruments issued by them increased to 277,950*l.* After the end of the year 1844 the balance of such instruments at any one time outstanding did not vary to any great extent.

"On 31st December, 1844, the sum or balance of them then outstanding was 285,450*l.*; on 31st December, 1845, that sum or balance was 312,352*l.*; on 31st December, 1846, it was 282,350*l.*; on 31st December, 1847, it was 279,600*l.*"

The case then showed that the greater portion of the funds so

of Australia, held on Wednesday the 9th of September, 1840—Present," &c.: "It was resolved, that the debentures or deposit notes, which had been approved of at a former meeting, should be stamped and signed; and, as it was considered more judicious that these securities should not be issued direct by the Bank, instructions were given to Messrs. B. and M. Boyd, the brokers of the Company, to undertake the issuing of the same; the commission to be 10*s.* per cent. per annum, according to the number of years specified on the bonds."

"At a meeting of the Royal Bank of Australia, held on Wednesday, 7th October, 1840—Present," &c.: "The subject of the appointment of agent of the Bank at Edinburgh was considered; and, it being mentioned that Mr. Robert Allan had acted in that capacity in the disposal of shares, and shown great zeal in its success, the board had determined to confirm the appointment, and directed that 10,000*l.* of the debentures of the Bank should be lodged forthwith with that gentleman, to be sold as opportunities might offer."

"At a meeting of the Royal Bank of Australia, held on the 4th November, 1840—Present," &c.: "A letter was read from Mr. Allan, in which, *inter alia*, he stated that it would be desirable he should be furnished with

a copy of the contract of the Bank, showing the power vested in the directors, enabling them to raise money by way of deposit notes or debentures, and which the board directed Mr. Allan should be furnished with." * * *

"At a meeting of the Royal Bank of Australia, held on the 11th November, 1840—Present," &c.: "A letter was read from Mr. Allan, in which he, *inter alia*, intimated that it was desirable, and would tend to give confidence and promote the interest of the Bank, if he was in possession of copious extracts, or a copy of the deed of settlement. The board directed that the chairman should make such extracts from the deed as he thought would meet Mr. Allan's views, and have notarial copy of the same made, with the signatures of those who had signed the deed attached."

"At a meeting of the Royal Bank of Australia, held on the 18th of November, 1840—Present," &c.: "The chairman submitted the *excerpta* from the deed of settlement, prepared for Mr. Allan, to exhibit to parties in Scotland, and which was approved by the board, and instructions given in writing to Mr. Allan to ask his opinion of the advantage of inserting the Bank's advertisement in the Scotch newspapers, with his name attached as its agent."

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raised was sent out to Australia in the possession of Mr. Boyd, who went out to Sydney branch in *January, 1842. After several statements not material the case proceeded. "A large proportion of the instruments issued in 1841 became due in the latter half of the year 1846. Funds were not received from Australia or elsewhere to meet them; and the directors had no funds in hand. The whole of the instruments which became payable before the end of 1847 were either paid or renewed when they fell due. The greater portion was renewed. In 1846 the plaintiffs purchased the instruments sued upon, with coupons annexed as aforesaid, under the following circumstances:

"The said G. H. Wray, on 22nd July, 1846, by order of the directors, sent to the said Robert Allan at Edinburgh 26,000*l.* of such instruments as aforesaid, with a letter of that date: Appendix, p. 50 (1).

"On 1st August, 1846, Wray similarly sent to Allan 8,000*l.* of such instruments as aforesaid. Amongst them were the three instruments of that date, sued on by the plaintiffs, together with a letter of the same date: Appendix (2).

"On 6th August, 1846, Wray similarly sent 20,000*l.* of such instruments as aforesaid, amongst which was the instrument of the 10th August sued upon, together with a letter.

[*16] "The plaintiffs, as such trustees as aforesaid, had become, as hereinafter mentioned, the holders of an *instrument, No. A. 217, for 100*l.*, in the same form as the present, dated 6th February, 1841, and payable on the 6th February, 1847; and on 20th November, 1846, Mr. Blair, one of the plaintiffs, gave Robert Allan, for the three first of the instruments sued upon, and the said coupons so annexed as aforesaid, the amount of the same instruments in cash, deducting the amount of the instrument for 100*l.* held by him, with the amount of the then due and unpaid coupons thereunto attached as aforesaid, and received in return the instruments so purchased and similar coupons as aforesaid annexed thereto.

(1) This letter was as follows. "With this you will receive 26,000*l.* of deposit notes in two registered parcels, viz." (setting out the numbers). "As you are fully aware of the importance of our having ample funds on or before the first of next month in cash, I need only request

your acknowledgment by return of post."

(2) This letter was as follows. "I beg to advise having sent this day 8,000*l.* in deposit notes of two and three hundred each, and which from their small amounts I hope will be easily placed."

"The following note of the above purchase was sent by Allan to Mr. Blair, enclosed in the letter which follows.

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Purchased for John Blair, Esq.				£	s.	d.
R. B. of Australia debenture No. 273 payable 1st August,						
1851	-	-	-	200	0	0
Ditto	Ditto	274	ditto	200	0	0
Ditto	Ditto	277 payable 1st Feb-				
ruary, 1852	-	-	-	200	0	0
Interest on 500l. (112 days)-	-	-	-	7	13	6
				607 13 6		
Less Ditto	Ditto, No. A. 217	-	-	100	0	0
				£507 13 6		

EDINBURGH, 20 Nov. 1846.

DEAR SIR,—The above is a note of the debentures which you purchased to-day.

(Signed) R. AND T. ALLAN.

"On 23rd December, 1846, Mr. Blair gave Allan, for the fourth instrument, sued upon, that for 1,000l. and coupons annexed as aforesaid, the amount of the same instrument, and received the same instrument and coupons annexed.

"The following note of the last mentioned purchase was handed by Allan to Mr. Blair, at the time of the purchase.

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Purchased for John Blair, Esq.		£	s.	d.
Royal Bank of Australia Deposit Note, P.	.	1,000	0	0
Interest from 10th August	.	18	10	0
		£1,018 10 0		

No. D. 349, payable 10th August, 1851.

EDINBURGH, 23rd December, 1846.

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"No commission was charged by Allan to Blair upon any of the transactions. At the time of the said sale of the said instruments and coupons by Allan, he, the said Allan, held for sale, and sold, other such instruments with coupons so annexed, as broker for other parties who had previously purchased them; and Allan was both before and at and after that time engaged in selling, and sold, all such instruments, charging commission. The amounts received by Allan on the sale of the instruments in respect of which this

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action is brought were accounted for by Allan, together with the proceeds of other transactions, to Messrs. B. and M. Boyd, so appointed brokers as aforesaid, and by the latter to the directors, after deducting a further sum for the commission of the said Messrs. Boyd. The Bank had no ledger account with Allan.

"On 27th July, 1846, Allan, by means of instruments to the amount of 20,000*l.*, part of the said instruments forwarded to him on 22nd of that month, took up other such notes or instruments issued in 1841, to the amount of 18,500*l.*, and also 600*l.* of coupons, and sent them to the directors through Messrs. Benjamin and Mark Boyd, with a letter of credit for the balance of 900*l.*

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"On 15th August, 1846, Allan, by means of other such *instru-ments to the amount of 30,000*l.*, part of the said instruments forwarded to him on the 22nd July, and 1st and 6th August, took up other such notes or instruments issued in 1841, to the amount of 30,000*l.*, which was reported to the directors at a board on the 19th August, when the instruments so taken up were cancelled, and an entry of the remittance and cancellation was made in the minute book.

"A further remittance was made by Allan to Messrs. Boyd on 29th December, 1846, accompanied by a letter relating, amongst other things, to the said sale of the said instruments so purchased by the plaintiffs, and sued upon, and which will be found in the Appendix (1). The nos. 273, 274, 277 and 349, specified at the end of the last mentioned letter amongst debentures sold to sundries, denote the instruments so sold to the plaintiffs and sued upon.

"In June, 1848, Allan had shown to Mr. Blair a printed list of the shareholders of the Royal Bank of Australia, which included the present defendants, and had recommended an investment on the security of such instruments as a safe one, terming them deposit notes. Mr. Blair, having communicated with his co-trustees on 8th July, 1848, purchased two such instruments, with such coupons so annexed from Allan, one of 500*l.*, No. B. 286, dated

(1) The part bearing on this subject was: "I now beg to hand you state-ment of how our debenture account at present stands." "We have taken up the 10,000*l.* bill at the Exchange Bank out of the proceeds of the 12,000*l.* debentures sold, and now hold your order at par for the balance."

In the debenture account attached Messrs. Boyd were debited, *inter alia*,

with "Commission on loan of 40,000*l.* at $\frac{1}{2}$ per cent." "Do. 12,000*l.* value debentures sold at 1 per cent." And they were credited, among other things, with "Amount of debentures sold at per note subjoined, and in-terest, 12,243*l.* 10*s.* 2*d.*" The note subjoined specified the numbers of the debentures sold.

2nd August, 1841, and payable 2nd *August, 1846, and signed, B. Boyd, John Mitchell and J. P. Robinson; and the other of 1,000*l.*, No. B. 306, dated 2nd August, 1841, and payable 2nd November, 1846, and signed B. Boyd, W. P. Craufurd and J. P. Robinson; and paid Allan the amount of the same instruments.

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“On 25th August, 1843, Mr. Blair purchased the before mentioned instrument for 100*l.*, with coupons so annexed, signed, J. W. Sutherland, John Mitchell and J. P. Robinson, and paid Allan the amount of the said instrument. The separate coupons annexed to these instruments purchased in 1843 were duly paid; and the instruments purchased in that year for 500*l.* and 1,000*l.* were respectively paid when due.

“Advertisements were inserted by Allan in the *North British Advertiser* newspaper, [in which Allan was termed ‘agent for Scotland,’] (1) several times, and were seen by Mr. Blair, about the dates.

“The coupons annexed to the said instruments sued upon, which fell due on the 1st of February, 1847, 1st August, 1847, 1st February, 1848, 1st August, 1848, 10th February, 1847, 10th August, 1847, 10th February, 1848, and 10th August, 1848, were respectively duly paid.”

The case then set out at great length the accounts and letters received from Australia, and other matters. As these were important only as evidence, from which the Court under the power reserved in the case was to draw inferences of fact, and the inferences drawn appear in the judgment, it is unnecessary to do more than state shortly that the funds raised in this country were employed in banking business in Australia and lost there; the Company stopping payment in 1848: but that the *directors in this country may at first have believed that the concern was very flourishing. On 30th July, 1845, the first general meeting of the shareholders was held, and a report and balance sheet read. On 29th July, 1846, the second general meeting was held and a report and balance sheet read. And on the 11th August, 1847, the third meeting was held and a report and balance sheet read. All these reports and balance sheets were set out in the case. They all represented the Bank as very flourishing, and recommended dividends. * * *

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The case then proceeded. “The said three reports were printed, and a copy sent to each shareholder. The dividends mentioned in the said three reports were paid; and each of the defendants

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(1) From a foot-note in the original report.

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received an amount proportioned to the number of shares for which he had subscribed. A general meeting was held in 1848; but the directors did not submit any report to the meeting, but asked for an adjournment, until they should receive full accounts from Mr. Sprot Boyd, whom they had sent out in the end of 1847, to enquire into the affairs of the Company in Australia. In the year 1848, the directors made a fourth call of 2*l.* 10*s.* per share, and a fifth call of 5*l.* per share; neither of which were paid."

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"On the 26th January, 1849, a circular was issued by order of the directors to the shareholders. The shareholders, including the defendants James Farquhar, Thomas Newman Farquhar, Patrick Hadow and James Ochterlony Walker, on receiving the last mentioned *circular, denied their liability in respect of the said instruments, and refused to be bound by the acts of the directors, except so far as they were bound in having executed the said deed of settlement of the Company.

"About the end of the year 1848, the said Company suspended payment: and, in the latter end of the year 1849, a petition was presented under the Winding-up Acts; and an order was made for the winding up the affairs of the Company under those Acts on the 26th of March, 1850. The signatures to the instruments in question are those of directors. The said instruments sued upon were duly presented for payment. Neither of the defendants, James Farquhar, Thomas Newman Farquhar, Patrick Hadow or James Ochterlony Walker was present at any of the said general meetings."

After some statements not important, the case concluded. "The directors in England had such interest in the Bank as above mentioned. They were also entitled to be paid for their attendances. These were not paid at the time, but were set off in their account in respect of credit shares in 1844, and ultimately settled in 1847. Except as aforesaid, and excepting their liability to pay up the balance of their credit shares, and any more immediate liability to creditors upon such instruments, their interests did not differ from that of the other proprietors. They never used the funds of the Bank for their own purposes, nor dealt in shares. They acted upon such motives as above mentioned, and not with any view to any separate advantage at the expense of the other shareholders.

"The Court is authorized to draw such inferences as a jury ought to draw.

"The question for the opinion of the Court is, Whether the

plaintiffs are entitled to recover or not? If *they are, judgment is to be entered up for the principal and interest: if not, judgment of nonsuit to be entered." * * *

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Cowling, for the plaintiffs:

The substantial question is whether authority was given by the shareholders to the directors to sign notes and borrow money on their credit. But the defendants make several objections to the form of the notes, which it will be convenient to dispose of first. Assuming that the directors had authority to sign notes, it is said that these notes do not purport to bind the shareholders, but only to bind the individuals who signed them. But the words "for ourselves and the other shareholders" *primâ facie* mean that the parties signing promise for the whole body: *Ex parte Buckley, In re Clarke* (1). In *The Bank of Australasia v. Breillat* (2) the plaintiffs recovered against the Bank of Australia on a note the form of which was "I promise to pay" 154,000L., "for value received, for and on behalf of the Bank of Australia. J. Norron, Chairman;" and in the judgment it was said that there was a clear *primâ facie* case, the note being "signed on behalf of the Company." And the form of an ordinary Bank of England note is not more clearly intended to bind that corporation than this was to bind the shareholders. * * It will be urged that a partnership can only be bound in the name of the firm: *Kirk v. Blurton* (3). It is unnecessary to enquire how that may be; for the name of the firm "The Royal Bank of Australia" is carefully printed on the documents. But, supposing that the notes are for some reason or other informal, the plaintiffs (assuming that the directors had authority to borrow money on the credit of the shareholders) might resort to the count for money lent, and recover the consideration. To this it is answered that this was not a loan, but a purchase, and that there is no count for money received. As to that, the facts are set out in the case. The word "sold" is used in the documents, no doubt; but, if the transaction was in substance a loan, the words are immaterial: *Denton v. Rodie* (4). In that case the borrower was a partner; but the authority of a partner is but an instance of agency. Here Allan was "the agent of the Bank," with whom debentures were lodged "to be sold as opportunities might offer." The very notes which are the subject of the action are sent to *him by the manager with

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[*25]

(1) 69 R. R. 735 (14 M. & W. 469).

(3) 60 R. R. 729 (9 M. & W. 284).

(2) 79 R. R. 24 (6 Moo. P. C. 152).

(4) 14 R. R. 823 (3 Camp. 493).

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a statement that it is important for the Bank to have funds, and of a hope that he can place them. * * Allan receives from the plaintiffs the full amount; and the Bank have the whole. For whom was Allan agent but the Bank? And what was this but in substance a borrowing on their note. Then comes the real question on the merits. The deed of settlement authorized the directors to issue notes and borrow money on the credit of the shareholders; if the deed were silent, the nature of the concern was such as impliedly to give them authority to do so; supposing that there was some private restriction on such authority or that the directors had abused it, still the plaintiffs, who *bonâ fide* gave their money in reliance on the apparent authority of the directors, may recover against the shareholders; and, lastly, the shareholders knew that the directors had borrowed money, and by silently accepting dividends with such knowledge ratified their act. * * The partners in an ordinary Bank have authority to borrow money on the credit of the partnership: *Bank of Australasia v. Breillat* (1): much more have the managers of such an unusual concern as this. Here the purposes for which the money was borrowed and to which it was applied were within the very scope of the business; but, supposing it to be otherwise, it would not affect the right of the plaintiffs. In *The Bank of Australasia v. Breillat* (2) part of the consideration of the note sued on was an advance to pay off debts alleged to be not legally binding on the defendants. But the Judicial Committee of the Privy Council, in their judgment in that case (3), held that if it were so it could make no difference: "it would be extravagant to hold, that the appellants, lending their money to the Company to enable it to meet its engagements, were bound by this circumstance to see to the nature of those engagements." Here the terms of the deed declare, by sect. 9, that the business of the Company shall include "the borrowing or taking up money at interest." Words nearly similar have been used in the various Bank Acts for a long period, and have been construed to comprehend every species of obtaining money on credit so as to be repayable: *The Bank of England v. Anderson* (4), *Booth v. Bank of England* (5). Such words must therefore be understood to bear this meaning when used by bankers. * * *

(1) 79 R. R. 24 at p. 53 (6 Moo. P. C. 194).

(3) 79 R. R. at p. 58 (6 Moo. P. C. 201).

(2) 79 R. R. 24 (6 Moo. P. C. 152).

(4) 44 R. R. 271 (3 Bing. N. C. 589).

(5) 51 R. R. 36 (7 Cl. & Fin. 509).

Sir Fitzroy Kelly, for the defendants *J. Farquhar, P. Farquhar, Hadow and Walker* (1) :

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Assuming, for the present, that it can be said that the directors have, either by the deed or otherwise, power to bind the shareholders by all ordinary banking matters and to borrow money on their credit (which is denied), still the defendants are not liable; for these instruments are by no means ordinary banking matters; and there was not in this case any loan. Whatever be the general powers of the partners in a Bank, the directors *here can at most but have such of them as are consistent with its being a joint stock Bank. Now no partner in any concern can bind his co-partners by a negotiable instrument jointly and severally.

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(LORD CAMPBELL, Ch. J. : *Mr. Cowling* has not argued that the notes are binding upon the shareholders severally; and you may assume that there was no authority on the part of the directors to bind your clients severally. But, assuming for the moment that there was authority to bind them jointly, may not the note bind them so far, though the attempt to bind them severally was *ultra vires* and inoperative?)

No. Supposing that the maxim, *Utile per inutile non vitiatur*, applied to the execution of a procuration, and that the excess could in such a case, if inoperative, be rejected, still the addition of a several promise is by no means inoperative or capable of being rejected. In the first place it is operative as binding the parties who signed the note, and also all such shareholders as individually authorized them so to sign it. Beyond doubt such shareholders are bound severally. It cannot be that the words "We" "for ourselves and the other shareholders" "jointly and severally promise to pay" are to be construed as a joint and several promise as against the shareholder A., who is shown to have sanctioned notes in this form, and only as a joint one against the shareholder B., who did not. The holder of the note can construe it only as it purports to be. And if it were held binding as a joint note the position of the shareholder would be altered; for he would then be bound to pay it; and, if he pays such a note, he makes evidence against himself that he has given authority to bind himself

(1) *Prentice* appeared for the defendant *Sutherland*; and the defendant *Connell* appeared in person: but the

COURT declined to hear more than one counsel argue.

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severally; and it is not possible to accompany the payment with such an explanation as shall show to all the world that it *is made only in respect of the joint liability. That is one reason why an authority must be strictly pursued, or it does not bind the principal. There are many instances in which this principle is acted upon in questions as to the validity of powers relating to real estate: *Doe d. Ellis v. Sandham* (1) is one. But the principle is stronger in mercantile transactions of all kinds, and more particularly where the authority is to execute negotiable instruments, which may come into the possession of persons who must take the instrument as it purports to be. That is the reason why a partnership bill does not bind, unless executed in the name of the firm: *Kirk v. Blurton* (2). In the present case the name of the firm is printed on the note; but the legal effect of the promise is that the individuals jointly and severally promise, not that there is a promise made by procuration of the firm. * * These words cannot be construed as two different promises, one for the firm, one for the individuals: *Ex parte Buckley, In re Clarke* (3). In an American case, *Bradlee v. Boston Glass Company* (4), the plaintiffs had lent money to the Company, and received as a security a note in this form: "We, the subscribers, jointly and severally, promise to pay Messrs. J. and T. Bradlee or order, for the Boston Glass Manufactory." It was signed by three persons who might have bound the Company by a promissory note duly signed. But SHAW, Ch. J., delivered the judgment of the COURT, that the instrument declared *on was not the note of the Company. He says: "The words 'jointly and severally' are quite decisive. The persons are, 'we, the subscribers,' and it is signed" A. B. and C. "This word 'severally' must have its effect; and its legal effect was to bind each of the signers. This fixes the undertaking as a personal one. It would be a forced and wholly untenable construction to hold, that the Company and signers were all bound; this would be equally inconsistent with the terms and with the obvious meaning of the contract." This case is cited with approbation in *Story On Promissory Notes* (2nd edition), p. 77, sect. 70.

[*30]

It has been argued that the plaintiffs, as *bonâ fide* holders, are entitled to recover because the directors have a *primâ facie* authority to bind the Bank by ordinary banking transactions. If

(1) 1 R. R. 369 (1 T. R. 705).

(2) 60 R. R. 729 (9 M. & W. 284).

(3) 69 R. R. 735 (14 M. & W. 469).

(4) 16 Pickering's (American) Reports, 347.

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this were so, still it would be plain that the note in question is not an ordinary banking transaction. It is for an unusually long period; and the attachment of coupons may have the effect of giving compound interest. But there is no such implied authority, in case of a joint stock Company, to one partner to bind the others. The deed only must be looked to: *Kirk v. Bell* (1). In the present deed there is no authority given: on the contrary, it is renounced by sect. 80, except when the instrument is made in the manner there prescribed. * * *

Then as to the count for money lent. It is said that this is a lending to the Bank through the directors, for a term of five years. That, if it were so, would show how injurious to the shareholders the attempt to bind them severally was; for the plaintiffs, who took what purported to be a joint and several security, would, on discovering that it was not a several security, be entitled at once to bring money had and received. They have not done so, but sue for money lent. Now every word in the statement of the case, and every word in the document, shows that this was not a loan on the security of these instruments, but a purchase of them. The purchaser of a bill may give more or less than its nominal amount, according as it is at a premium or at a discount; but he recovers ultimately the amount in the bill. A lender taking the instrument as a security recovers the amount lent. [31]

(LORD CAMPBELL, Ch. J.: No doubt purchase and loan are different contracts attended with different incidents.)

The case of *Denton v. Rodie* (2) is in point only as showing that the word "sold" may be inaccurately used in reference to a transaction of loan. The present case is like *Emly v. Lye* (3). * * *

Cowling was heard in reply.

Cur. adv. vult.

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LORD CAMPBELL, Ch. J., now delivered the judgment of the Court:

The question which we have to determine is: Whether the shareholders in the unregistered joint stock Company called "The Royal Bank of Australia" are jointly liable, either as makers of the promissory notes set out in the special case, or as borrowers of the money sought to be recovered? One of the defendants,

(1) 83 R. R. 456 (16 Q. B. 290).

(3) 13 R. R. 347 (15 East, 7).

(2) 14 R. R. 823 (3 Camp. 493).

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being a director of the Company, actually signed the notes; and another was a director when by his authority they were issued; but the other four defendants can only be made liable as shareholders. We are of opinion that the shareholders are liable, both as makers of the notes and as borrowers of money for which the notes were intended to be a security.

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On the form of the notes several preliminary objections were taken, which it may be convenient first to dispose of. *Sir Fitzroy Kelly*, in his able argument, began by contending that, even supposing that the directors had authority to bind the shareholders by promissory notes to secure money for the purposes to *which the sums raised by those notes were to be applied, these notes are not binding on the shareholders, by reason of the words "and severally" introduced into them. It is quite clear that a partner cannot by any instrument make a copartner separately liable for a partnership debt; and a shareholder in this Company separately sued on one of those notes might, in due form, successfully deny his separate liability. But it does not follow that the shareholders may not be jointly liable, if there was authority to bind them by a joint note. Supposing the intention of the instrument to have been to make the shareholders separately as well as jointly liable, and not merely to impose a separate liability upon each of the three directors who signed it, still, as far as the shareholders are concerned, it may be void as a separate and valid as a joint security. The expression in the note by which a separate liability is sought to be created may be easily detached in construing it, and taken *pro non scripta*; as against the shareholders it is utterly void, and it does them no injury. The perfect and complete contract of joint liability is not vitiated by the directors having, *ultra vires*, written upon the same piece of paper words which are wholly inoperative. If A. and B. are in partnership, and A. for a partnership debt *bonâ fide* gives a promissory note in the partnership firm, there seems considerable difficulty in contending that A. and B. may not be jointly sued upon it because it professes to bind them separately as well as jointly. Why should the security perish instead of being available, when, as far as it is sought to be enforced, it might lawfully be created, and it expresses the intention of the parties? Surely this would be unjust and contrary to well-known *legal maxims. No case respecting promissory notes has yet gone further than *Perring v. Hone* (1), which only intimates the

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truism that a partner cannot make his copartner separately liable by a joint and several promissory note. *Sir Fitzroy Kelly* relied upon various cases respecting the execution of powers, under settlements or wills, as to real estate; but they by no means made out his proposition, that, wherever there is any excess of authority by the donee of the power, what is otherwise, *per se*, well done in the execution of it is wholly void: and the analogy between the execution of such powers and the making of promissory notes for a partnership debt is so remote that we do not consider it necessary to examine further *Doe d. Ellis v. Sandham* (1), or his other authorities of the same class. *Barron v. Fitzgerald* (2), afterwards cited, is not more in point, as it only says that, if a man requests the advance of money in doing one thing which he requires to be done, he is not liable, in an action for money paid to his use, for a sum of money expended in doing another thing which he did not authorize. It was next objected that those notes are not binding on the shareholders because they are not properly given in the name of the partnership firm. But we are of opinion that, if the directors by whom they are signed had authority to draw them, they are sufficient, as they clearly express an intention that all the shareholders in the Royal Bank of Australia should be jointly bound by them; and, unless the names of all the shareholders were enumerated, we hardly know any language by which this intention could be expressed more clearly. A joint stock Company, like any other partnership, may have a firm; and, when that firm is properly used, it is supposed to comprehend all the partners. There is no necessity for that firm being signed at the bottom of a promissory note by which a joint stock Company is to be bound, any more than the name of a corporation that has power to issue promissory notes; and in point of practice such notes are always signed by directors, or some agent appointed for that purpose. The form of the notes in question is substantially the same as that in *Ex parte Buckley, In re Clarke* (3), which was held to be sufficient to make all the partners jointly liable, being a promise by one partner for himself and the other three partners, and amounting to one promise of the four persons constituting the firm. Here the promise is by three directors who are shareholders, "for themselves and the other shareholders of the said Company;" and, if the three directors had authority, the Company is bound. *Hall v. Smith* (4)

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[*35]

(1) 1 R. R. 369 (1 T. R. 705).

(3) 69 R. R. 735 (14 M. & W. 469).

(2) 6 Bing. N. C. 201.

(4) 1 B. & C. 407.

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was there declared not to be law : and, considering that the note in that case was signed by the defendant expressly for himself and his two copartners jointly, there seems great difficulty in seeing how he could be considered by using the pronoun "I" to intend to create any separate liability. But if *Hall v. Smith* (1) could be supported, it would be no authority to show that a signature in the name of the firm is always necessary to create a joint liability. The defendant's counsel strongly relied upon *Kirk v. John Blurton and Charles Habershon* (2), in which, the defendants being sued as joint drawers of a bill of exchange, it appeared that the bill was drawn by the defendant Habershon in the firm of "John Blurton & Co.;" that the two defendants carried on the business of printers in partnership; that the name of John Blurton was written over the door of their place of business; and a witness stated that they had been in the habit of drawing bills which he had seen; but he could not take upon himself to say whether they were in the name of "John Blurton" or of "John Blurton & Co." The Court of Exchequer, considering "John Blurton" to be the firm, held that John Blurton could not be bound by a bill drawn by Habershon in the firm of "John Blurton & Co." It is unnecessary to say how far we concur in this case; for, at any rate, it only decides that, where the firm professes to be used, it would necessarily be fatal to add to the single name, which usually constitutes the firm, "& Co.," whereas, at the case at Bar, the signature at the bottom of the note does not profess to be a firm, but the signature of three directors acting for a joint stock Company, and the question must be whether, when professing to bind the Company, they had authority to do so. In *Healey v. Story* (3), which was an action by plaintiff as payee against the two defendants as makers of a promissory note, it appeared that the defendants were the directors of a joint stock Company called "The Wesleyan Newspaper Association," completely registered under stat. 7 & 8 Vict. c. 110, and that they gave to the plaintiff for a debt due from the Company a note in the following form. "LONDON, March 19, 1847." "On demand, we jointly and severally promise to pay *Mr. Edward Healey, or order, the sum of 250*l.*, value received, for and on behalf of The Wesleyan Newspaper Association.

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"PARKER STORY
"JAMES WARE } Directors."

(1) 1 B. & C. 407.

(2) 60 R. R. 729 (9 M. & W. 284).

(3) 3 Ex. 3.

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The question was whether the defendants were personally liable on the note; and the Court (we think very properly) held that they were; for, this being a *quasi* corporation, there could be no individual and separate liability intended to be cast upon the shareholders, and the defendants evidently professed to make themselves personally liable. But the doctrine there laid down cannot apply to an instrument expressly professing to bind the shareholders in an unregistered Company. The American case (1) decided by that very learned Judge Chief Justice SHAW of Massachusetts we regard with the utmost respect; but it appears to have proceeded exactly on the same principle. The Glass Company being a corporation, and the directors who signed the note having promised "jointly and severally," it was held not to be the note of the Company, but of the individuals who signed. The decision of the Court of Exchequer in *Penkivil v. Connell* (2), upon one of these very notes issued by the Royal Bank of Australia, we entirely concur in. Each director who signs the notes is liable to be sued separately upon them; but this decision does not in any degree affect the joint liability of the shareholders.

It is further objected to the form of the notes on which this action is brought, that they are payable at the unusual period of five years after date, that the *interest is made payable half yearly by auxiliary notes called coupons, that compound interest might thus be recovered from the Company, and that the first coupon, if issued after the day of its date, would be an infringement of the monopoly of the Bank of England. But, in answer to these objections, it is enough to say: that the validity of the notes must depend upon the authority to make them, not the length of the period which they have to run; that, if usury were pleaded and would be a defence to this action, no more than simple interest at 5l. per cent. is reserved according to the contract; and that, if there were any objection to the legality of the first coupon, it could not taint with illegality the promissory notes for the principal money at five years' date on which the action is brought.

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We now arrive at the real merits of the cause. And we have to consider whether the directors of this Company had authority under the circumstances stated to make these notes, which are allowed to be signed by three directors and to be issued by order of a court of directors. We do not think that the plaintiffs can rely

(1) *Bradlee v. Boston Glass Company*, 347.

16 Pickering's (American) Reports, (2) 5 Ex. 381.

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entirely upon an implied authority in the directors to issue notes and to raise money in the ordinary course of banking business. Although mere shareholders in a joint stock Company have no authority to pledge the credit of the Company, the directors appointed to carry on the business would have impliedly such of the ordinary powers of partners in a common mercantile partnership as are necessary for the carrying on of the business for which the Company is formed; and, where a joint stock Banking Company is established, the directors would be considered the agents of the shareholders to borrow money for the ordinary purposes of *the business, and to give securities in the ordinary form for the money borrowed. In the case of *The Bank of Australasia v. Breillat* (1), before the Judicial Committee of the Privy Council, that consummate Judge Mr. PEMBERTON LEIGH, Chancellor of the Duchy of Cornwall, in pronouncing the judgment of the Court, says: "The nature of a banker's business, especially if the Bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may often be impracticable, or the concern must be ruined. We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed."

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But, in the present case, the transactions out of which these notes arose cannot be considered to have been in the ordinary course of banking business: the money was originally borrowed to be used as capital; and the securities were not such as would usually be taken for an ordinary loan to a Banking Company. We therefore *think that it lies upon the plaintiffs to show that, from some extraordinary course of business described in the deed and authorized by it, or by some extraordinary powers conferred upon

(1) 79 R. R. 24, 53 (6 Moo. P. C. 152, 194).

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the directors, they could bind the Company in a manner that would have been incompetent to the partners of a banking firm, or the directors of a joint stock Company instituted to carry on the usual operations of banking; or, failing these, that there has been a ratification by the shareholders of these acts of the directors which otherwise would not have been binding on them.

We must therefore apply ourselves in the first place to the deed of settlement executed by the shareholders. The scope of the contemplated business is described in sect. 6, by which the directors were to have "full power and authority to carry on the business of the Company in the city of London and in such other cities, towns or places within the United Kingdom, or within her Majesty's colonies or settlements of New South Wales, Van Diemen's Land, Western Australia, Southern Australia, or any other part of New Holland, or within the islands of New Zealand, or within the territories of the Honourable The East India Company, or within the colony of the Cape of Good Hope, or within any other islands, countries, or territories to which her Majesty's subjects may lawfully trade beyond the Cape of Good Hope to the Straits of Magellan, which to the court of directors may seem advisable." Thus the directors were not only authorized to carry on the business of banking in London, but to establish as many Banks as they might deem advisable over almost the whole habitable globe. For this *purpose they must incidentally have been vested with much more extensive powers than belong to those who are merely to carry on in one particular locality a Bank, either of deposit, or of issue, or of both. Further, sect. 9 expressly declares: "That the trade or business of the Company" (wherever carried on) "shall be that of bankers or of banking, including the making and issuing of bank notes, and bills payable on demand, after sight, after date, or otherwise, and the making of loans" &c. "on lands and tenements, on sheep, cattle, and live stock, on wool, farm stock and produce, and on all and every other kind and description of property whatsoever, and including" "the borrowing or taking up money at interest on receipts, on inland or foreign bills of exchange or promissory notes, bonds, debentures, deposit receipts, or other obligations, as shall from time to time be deemed expedient." Then, by sect. 10, "the management of the Company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities and monies for the time being, belonging to the Company, and the

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regulation and determination of the modes and terms of carrying on and transacting the business of the Company, and all other matters and things whatsoever connected with or relating to the business or concerns of the Company, shall be solely and exclusively vested in and reposed in the court of directors, except as herein is excepted or otherwise provided." With such transcendant powers to accomplish such stupendous objects, can it be said that the directors, for raising capital to trade with, were confined to the sale of shares, and to enforcing calls upon those shares till 50*l.* had been paid upon each, whatever might be the state of the share market, whether the shares of the *Company might be at a premium or at a discount, and although the sudden multiplication of calls might necessarily lead to the utter ruin of the concern. It is said, truly, that the purpose for which the money was originally raised by the promissory notes was not (as in the *Australasia and Australia* case (1)) to discharge any pre-existing engagement of the Company: but is there not here an express authority given to raise money to be employed as capital in the manner which was adopted by the directors? They were to borrow or take up "money at interest on" "promissory notes," "debentures," "or other obligations." And how to be applied? "In making of loans and advances to customers and other persons" on lands, tenements, on sheep, cattle, wool, &c. Does not this mean that the money might be borrowed on promissory notes or debentures in this country, and sent to Australia, where, branch Banks being established, it should be lent at a high interest to customers and others on lands and tenements, sheep, cattle and other property to be pledged? If there was authority so to borrow the money, there was authority to give the promissory notes or debentures as a security for it: there being authority so to borrow the money, the *bonâ fide* holders for value of the promissory notes or debentures could not have been prejudiced by the misapplication of it. But, in truth, it was not misapplied. The case finds that the directors "never used the funds of the Bank for their own purposes, nor dealt in shares." And it appears by the evidence that the money was carried to Australia, that a branch was established at Sydney, and that a sum of above 300,000*l.* was there advanced upon lands, sheep, *cattle, wool and such property as is specified in the deed to be taken by the directors as security for advances.

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The plaintiffs likewise relied upon sect. 43 of the deed, which

(1) *Bank of Australasia v. Breillat*, 79 R. R. 24 (6 Moo. P. C. 152).

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says : " That the court of directors may issue, at any of the offices or banking houses where the business of the Company shall be carried on, any notes or bills payable after date, after sight, on demand, or otherwise, which it shall be lawful or competent for the Company to issue under or consistently with the laws for the time being in force in relation to bankers or Banking Companies." We think, however, that this applies only to dealing as a Bank of issue, and would not extend to the borrowing of money to be employed in trade on such instruments as are the foundation of the present action. To authorize such borrowing we think that the sections previously quoted are abundantly sufficient. According to *The Bank of England v. Anderson* (1), and various other cases upon the Bank Monopoly Acts, this was a " borrowing or taking up money at interest " " on promissory notes " or " debentures." The observation, that the power of borrowing was confined to borrowing on securities and property which the Company might acquire from others in the course of their dealings, is wholly at variance with the language of the deed. The " promissory notes " and " debentures," there mentioned, were evidently promissory notes and debentures to be originally created by the directors, and given by way of security for sums borrowed on behalf of the Company. In *Burmester v. Norris* (2), in which it was properly held that there was no power to borrow on the credit of a Company, the business to be carried on and the *power conferred on the directors by the deed were quite different from what we find here.

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The directors in this Company having such a power of borrowing as they have exercised, it follows that the sums intended to be secured by the promissory notes might be recovered as for money lent, if there were any objection in point of form to the validity of the notes. The defendants contend that this was a mere transaction of purchase and sale. The word " purchase " is no doubt used in the documents relating to the affair ; but this does not alter its nature ; and it resolves itself into a loan of money for a given time at 5*l.* per cent., payable half yearly, the instruments being given as security for payment of principal and interest. There is no difficulty in ascertaining the sum which was lent and is to be recovered. This was originally calculated between the parties according to the sum mentioned in the note, taking into consideration the interest from the time of the advance. The case of *Denton*

(1) 44 R. R. 271 (3 Bing. N. C. 589).

(2) 6 Ex. 796.

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v. Rodie (1) is an authority, expressly in point, that this transaction may be treated as a loan; and the ruling of Lord ELLENBOROUGH at *Nisi Prius* seems to have been acted upon by Lord Chancellor ELDON who had directed the issue.

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We have considered the parts of the deed relied upon by the defendants, particularly sections 14, 15, 23, 24 and 30; and we are of opinion that none of them, by way of exception or provision or otherwise, invalidate the securities sued upon in this action. The appointment of trustees, the duties imposed upon them, their liabilities and their rights, do not in any degree interfere with the authority of the directors to borrow on promissory *notes or debentures. The object of s. 30 is to prevent any shareholder from signing, accepting or indorsing any bill, note or negotiable security, and to empower the trustees and court of directors to appoint any person in the employ of the Company to sign, draw, accept and indorse bills of exchange, promissory notes and other negotiable securities, without disabling the directors personally to exercise the powers conferred upon them under the sanction of the court of directors. The nullifying words in this section could hardly affect a *bonâ fide* holder, who, without notice of any irregularity in the framing of the security, might fairly presume that the three directors who sign the notes were duly authorized by a resolution of the court of directors and the trustees to do so, if there ought to have been such a resolution. But these words apply only to bills, notes and securities signed by a manager or agent not duly authorized in the prescribed form.

We are further of opinion that, if there had been any irregularity in the original transaction which would have exempted the shareholders from liability, they would have rendered themselves liable by subsequent ratification. For four years, they were studiously kept in ignorance of the manner in which the business was conducted, they having deliberately consented, during that long period, to remain in ignorance, and to leave everything to the discretion of the directors, in whom they placed unbounded confidence, receiving in the meantime a handsome yearly dividend. At length the 30th day of July, 1845, arrived, when, according to the deed, there was held the first general meeting of proprietors, and a statement of the affairs of the Company was laid before them.

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Although this statement is in parts *obscure, we think that it communicates to any person of ordinary understanding, and in any

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degree acquainted with commercial affairs, the information that, beyond the paid up capital upon the 11,620 shares represented to have been issued, there had been at least between two and three hundred thousand pounds borrowed by the directors, on the credit of the Company, in this country, and remitted to Australia to be used as a trading capital there. The argument, that the item of "remittances to" "the colonies" might mean sums deposited here to be remitted to emigrants by bills of exchange, is completely answered by the item showing the nature of these remittances and how they had been applied. "Advance to 31st Decr., 1844, made on sheep, cattle, horses and stations for the same; wool, lands, houses, wharves and discounts, &c. 341,278*l.* 1*s.* 4*d.*" The account shows a profit on these transactions of 26,873*l.*, after deducting all expenses &c. and payment of four years' dividend to the shareholders on paid up capital to 15th April, 1845. A similar report was laid before the shareholders at the general meeting held 29th July, 1846: and this expressly stated "that the capital of the Bank continues to be employed in advances on the collateral securities of live stock, wool, &c., a system adapted to the circumstances of the colony." It also contains an item of 24,100*l.* for "paying off deposit notes," the name by which the notes given for money borrowed in this country were generally called. The balance of profit was reduced to 17,076*l.* 4*s.* 2*d.*; but out of this balance an increased dividend of 6*l.* per cent. was paid to and received by the shareholders. In the year 1847 a similar report was laid before a general meeting of the shareholders, when, as on former occasions, they by a vote approved of all *that had been done, and thanked the directors for ably and successfully conducting the business of the Company. And again they received a dividend. We may commiserate their situation in the year 1849, when, the Company having become insolvent, an order was made for settling its affairs in the Court of Chancery under the winding up procedure, and they were called upon as contributories; but the acts of the directors, which they now seek to repudiate, we think that they both antecedently authorized, and subsequently ratified. They may have been very ill used by the directors; although it is possible that the directors (who are acquitted of any personal misappropriation of the funds of the Company) may, in common with themselves, have been under the delusive hope that enormous gains would be made from the speculations into which they entered in Australia, and that, all concerned being enriched,

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the engagements of the Company would all be honourably fulfilled. But, whether the directors have misconducted themselves towards the shareholders or not, the loss which has accrued cannot, according to our views of the case, be thrown upon the *bonâ fide* creditors of the Company.

In the present case we think, upon the evidence submitted to us, that the plaintiffs were the *bonâ fide* holders of these notes and lenders of the sums intended to be secured thereby; that they are entitled to recover; and therefore that judgment must be entered up in their favour for principal and interest.

Judgment accordingly.

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FOSTER v. MENTOR LIFE ASSURANCE COMPANY.

(3 EL. & BL. 48—83; S. C. 2 C. L. R. 1404; 23 L. J. Q. B. 145; 18 Jur. 827; 22 L. T. O. S. 305.)

The M. Insurance Company executed a deed poll which was a life policy for one year on the life of O. It was in the ordinary printed form of such policies, and commenced with a recital that the assured had on 21st November last caused to be delivered into the office of the M. a declaration in writing, signed by them, touching the age, past and present health and other circumstances relating to O., which the assured had agreed should be the basis of the contract. And there was the usual proviso that if anything in the declaration was untrue the policy should be void. In an action on this policy the M. pleaded that the declaration was untrue.

On the trial, it appeared that the policy was one of reinsurance by the B. Company, who had several years before insured O.'s life for a larger sum. On the negotiation for the reinsurance all the papers relating to the original insurance were shown to the M. The M. sent to the B. one of their printed forms for a proposal for insurance, adapted to the case of an original insurance, having many printed questions relating to the health of the party, with blanks for the answers, and, below, a printed declaration by the person whose life was to be insured that the above statement was true, and an agreement on the part of the persons who were to be assured that the declaration should be the basis of the contract, and that if any thing therein contained was untrue the policy should be void; with blanks at the bottom of the declaration for the signatures of the person whose life was to be insured, and of those in whose favour the insurance was to be made. The M. had bracketted together, in ink, the questions relating to the health of O., and written "for these particulars see B. papers attached." The manager of the B. signed under this his name, and returned the paper, with the blanks for the signature of the declaration not filled up. The B. papers were those relating to the original insurance, and contained a declaration by O. as to his then state of health. It was now admitted that this declaration was then true, but that the state of O.'s health had, without the knowledge of either the M. or the B., changed, and the declaration, referred to the state of health at the time the paper was sent to the M., would no longer be true. After this paper had been sent in, the policy was executed, and sent to the B., who received and kept it without observation on the form of the recital. Some evidence was, without objection, given

of a custom in reassurances to confine the declaration to the state of health at the time of the original insurance.

The learned Judge left it to the jury to consider all the circumstances, and say whether it was intended by both parties that the paper should be understood as a declaration as to O.'s present health. The jury found for the plaintiff. On a motion for a new trial the Court were equally divided.

ERLE, J., held that the terms of the policy showed that the contract was on the basis of there being a declaration as to the then state of O.'s health, and that the assured seeking to enforce it could not aver that there was no such declaration: further, that, by acting on the policy containing a recital that there was such a declaration, the assured had concluded themselves from denying that there was such a declaration: further, that the evidence of usage was inadmissible: and for these reasons that there should be a new trial.

WIGHTMAN, J., thought that the assured, by acting on the policy containing the recital, had not concluded themselves from denying that there was such a declaration; but that they had made such weighty evidence against themselves that it was misdirection not to urge this very strongly to the jury. And for this reason he held that there should be a new trial.

COLERIDGE, J., thought that the name attached to the paper in question might or might not be a signature to the whole paper, and that it was a question for the jury whether it was so or not: that this question was properly left to the jury, and that, if it was for the Court to construe the declaration, he should construe it in the same way as the jury; and that, the evidence of custom having been admitted without objection, it was not material to consider whether it was admissible or not: and that the recital, being only by the defendants, did not conclude the assured. He therefore held that the verdict should stand.

Lord CAMPBELL, Ch. J., thought that, the writing being imperfect and ambiguous, so that there was some question for the jury on it, it became a question for them to construe the whole; that, if the intention had been to represent that there was such a statement, there would have been an estoppel, but, if there was no such intention, the defendants' recital did not estop the other side: that the evidence of custom was not irrelevant: and, supposing it to be a question for the Court, that the conclusion to which the jury had come was right. He therefore held that the verdict should stand.

The rule dropped.

DECLARATION on a policy of assurance to the trustees of the Britannia Mutual Life Association, *under the seal of the defendants, whereby, "after reciting that the said trustees of the said Association were desirous of effecting an assurance with the defendants, upon the life of Gaspard Gabriel Gillion Alfred, Count D'Orsay, in the sum of 1,500*l.*, and also reciting that the said trustees had caused to be delivered into the office of the defendants a declaration or statement in writing signed by them, bearing date the 21st day of November then last, setting forth the age, and the past and present state of health, and other circumstances touching the habits of the life of the said person, on whose life the said assurance was to be effected, which alleged declaration, so far as

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it respects the age of the said person, was thereby recited to be admitted to be correct; and also reciting that the said trustees had agreed that the said alleged declaration or statement should be the basis of the contract between them and the defendants;” and reciting the payment of 65*l.* 2*s.* 6*d.* as a premium: it was by the policy agreed that the defendants insured to the trustees, for twelve calendar months from the day of the date thereof, the life of Count D’Orsay for 1,500*l.* “And it was in and by the said policy provided that, if any thing averred by the said trustees in the alleged declaration so recited as aforesaid, and alleged to have *been made by them, was untrue, that the policy should be null and void, and all premiums and other moneys paid in respect thereof should be forfeited to the defendants.” The declaration then set out the rest of the policy, which is not material to the questions discussed. Averment: that all conditions necessary to entitle plaintiff to receive the money insured thereby in the events therein mentioned have been performed and fulfilled. Further averment: that the “trustees did not, nor did the said Company, in any manner aver or declare to the defendants anything that was untrue, in any declaration in writing or otherwise howsoever.” Averment of interest in the assured and of the death of Count D’Orsay within the twelve months. Breach, non-payment of the sum assured according to the policy.

2nd count for money had and received, and interest.

Plea to 1st count. “That the said trustees, and the said Company, did aver and declare to the defendants, in the said declaration mentioned in the said policy as agreed to be the basis of the said contract, something that was untrue; that is to say: That, at the time of the delivering of the said declaration into the office of the defendants, the said Gaspard Gabriel Gillion Alfred, Count D’Orsay, was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas, on the contrary thereof, the said Gaspard Gabriel Gillion Alfred, Count D’Orsay, was not then in a good state of health, but was then afflicted with a disease or disorder tending to shorten life.”

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As to the residue of the declaration: Never indebted.

Replication, taking issue on both pleas.

On the trial, at the London sittings after last Trinity Term, before Lord Campbell, Ch. J., it appeared that, in 1850, the Britannia Life Assurance Company was divided into two Companies: one of them was the Company, now plaintiffs in this

action, called the Britannia Mutual Life Association. On the division of the two Companies, the Britannia Mutual Life Association took, as part of their share of the property, five life policies, executed by the Britannia Life Assurance, on the life of the Duke of Beaufort for 5,000*l.*, on that of Mr. Brooke for 5,000*l.*, on that of Mr. Owden for 5,000*l.*, on that of Count D'Orsay for 4,500*l.*, and on that of Mr. Cowan for 4,000*l.*

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The Britannia Mutual Life Association had resolved not to run a greater risk on any one life than 3,000*l.* Mr. Foster, the nominal plaintiff, who was manager, was therefore directed to reinsure the surplus above that sum on each of these five lives above mentioned. He accordingly offered the five reinsurances to the Medical Invalid Office, the managers of which objected to the Duke of Beaufort's life as being hazardous, and would not insure him under 30*l.* 16*s.* per cent., but were willing to take the other four at the ordinary rate. Foster then offered them to the manager of the defendant's office, stating verbally what had passed at the Medical Invalid Office; he said, that the whole five must be taken together; that, as the Duke of Beaufort's life was a hazardous one, 20 per cent. premium *would be paid for insuring the 2,000*l.* on his life, but that the others must be taken at the rate of ordinary lives of their respective ages. He gave the addresses of three of the lives insured, but said that Mr. Brooke's address was not known at the Britannia Mutual Life Association, and that if the Mentor Life Assurance wished to make enquiries about him they must find him for themselves; and that Count D'Orsay was then in Paris; but that every particular about him was well known in London, and the Count was notoriously a first class life.

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At the same time he left with the Mentor Life Assurance Company all the papers relating to the original insurances of the five lives in question with the Britannia Life Assurance Company.

After this, five papers relating to the five assurances were sent over from the office of the Mentor Life Assurance Company, to that of the Britannia Mutual Assurance Company and returned. That relating to the assurance on the life of Count D'Orsay was, when given in evidence, as follows.

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Mentor Life Assurance Company, 2, Old Broad Street.

Proposal for Assurance.

Questions. Answers.

1. Name, Residence and Description of Party proposing Assurance?	- Trustees of the Britannia Life Assurance Company.
2. Name, Profession or Occupation, and Residence of Party whose Life is to be assured?	Gaspard Gabriel Gillion Alfred Count D'Orsay.
3. Amount and Term of Assurance, and according to which of the printed Tables it is to be effected; if according to Table I., whether the premium is to be payable Annually, Half-yearly, or Quarterly?	£1,500. Table I. Whole Life.
4. Place and date of Birth, and Evidence of Age?	Paris 4th February 1801.
5. Age next Birthday?	51.
6. Whether Married or Single?	
7. If had the Small Pox, or undergone Vaccination?	
8. If suffered from habitual Cough, Spitting of Blood, Asthma, or any disease of Chest or Lungs?	
9. If ever suffered from Apoplexy, Palsy, Insanity, Epileptic or other Fits, Dropsy, Rupture, Gout, Rheumatism, or any other disease tending to shorten life?	
10. Whether of sober and temperate habits?	
11. Whether of active or sedentary habits?	
12. Whether liable to any hereditary disease?	
13. Whether employed in the Naval or Military service?	
14. If resided abroad state when, where, and how long?	
15. If there be any circumstances connected with health, habits, or otherwise, calculated to render an Assurance of Life more than usually hazardous?	
16. Whether the party has ever made a proposal for Assurance at this or any other office, and if so, what was the result of each such application?	
17. The name and residence of the ordinary Medical Attendant, and how long known to him?	
[If the Party cannot refer to a Medical Man the reason must be so stated in the answer, and in that case the Party must refer to two Private Friends.]	
18. If recently received advice from any other person or persons, give the name and address of such?	
19. The name and residence of an intimate friend, not being a relative or interested in the Assurance, and how long known to him?	

For these Particulars see Copies of Britannia Papers attached.
E. R. Foster,
Resident Director.
21st Nov. 1851.

DECLARATION.

I, Count D'Orsay, above designed, do hereby declare that I am at present in a good state of health, and am not afflicted with any disease or disorder tending to shorten life; that the above statement of my age, health, and other particulars, is true; and that I have not withheld or concealed any circumstance tending to render an Assurance on my Life more than usually hazardous; and We the Trustees of the Britannia Life Assurance Company (the parties in whose favour the Assurance is to be granted) do hereby agree that this Declaration shall be the basis of the Contract between us and the Mentor Life Assurance Company; and that if any untrue averment is contained in this Declaration, or in the answers above given, all sums which shall have been paid to the said Company upon account of the Assurance made in consequence thereof shall be forfeited, and the Assurance be absolutely null and void.

Signed at _____ this twenty first day of November in the year of our Lord One thousand eight hundred and fifty one.

Signature of Party whose life is to be Assured - _____

Signature of Party in whose favour Policy to be granted - _____

Witness _____

Those parts of the above document that are in Roman characters were in the original printed. It was admitted that the parts of it which are printed in italics (with the exception of the words "E. R. Foster, Resident Director") and the bracket uniting several questions were written upon it before it was sent from the Mentor Life Assurance Company's office to that of the Britannia Mutual Life Assurance Company, having been filled up by some of the clerks in the Mentor Life Assurance Company's office. The words "E. R. Foster, Resident Director," were written across it by Mr. Foster, the nominal plaintiff, who was in fact the resident director; and then it was sent back to the Mentor Life Assurance Company. It was not very clear on the original whether the bracket was intended to include the 6th and 19th question as well as those between them, or not; but nothing turned upon this. The four other papers were, *mutatis mutandis*, similar, but relating to the other four lives. The Britannia papers, of which copies were attached, were the papers on which the original insurances were granted.

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The original policy on the life of Count D'Orsay had been granted in 1845. Amongst the papers relating to it was a paper of questions very similar to those above set out, to which were answers signed by Count D'Orsay, and by the original insurer, and there was also a report, by the medical referee of the Britannia Life Assurance, on the state of the Count's health. These gave a most favourable account of his health and constitution. On the face of them all these papers represented the state of things in 1845, when the original policy was granted. It was not disputed that, in 1845, and down to a short time before November, 1851, Count D'Orsay had been a remarkably eligible life, and that both parties supposed that he still continued so. But in fact, before 21st November, 1851, the Count was already suffering under a mortal disease of which he afterwards died. The defendants accepted the five reassurances proposed to them; and they executed five deeds poll. These were printed forms, the blanks of which were filled up.

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The policy on Count D'Orsay commenced: "Whereas (William Bridgett, John Drewett and James Foster, trustees of the Britannia Mutual Life Assurance Association, Princes Street, in the city of London,) the persons assured by this policy are desirous of effecting an assurance with the Mentor Life Assurance Company, upon the life of (Gaspard Gabriel Gillion Alfred, Count D'Orsay,) in the sum of (1,500*l.*). And the said assured have caused to be delivered into

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the office of the said Company a declaration or statement in writing, signed by them, bearing date the (21st day of November last), thereby setting forth the age and the past and present state of health and other circumstances touching the habits of life of the said person, on whose life the assurance is effected, which declaration so far as it respects the age of the said person is hereby admitted to be correct, and the said assured have agreed that the said declaration shall be the basis of the contract between them and the said Company." The parts between () were filled up in writing; the rest was printed. It is unnecessary to set out the rest of the instrument, the effect of which corresponded with that set out in the declaration.

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The Mentor Life Assurance Company then received payment of the five premiums, amounting in the whole to 64*l.* 10*s.* 10*d.*, in one cheque. After the Count's *death, it appeared that in November, 1851, his life was not insurable. The defendants resisted payment on the ground that the paper signed by Mr. Foster, above set out, amounted in legal effect to a declaration by the assured, on 21st November, 1851, as to the then present state of health of the Count. At the trial, both sides examined witnesses as to a supposed custom, in cases of reinsurance, to confine the warranty on the part of those reinsuring to the state of health at the time of the original insurance, and to leave the reinsurers to enquire for themselves as to whether it had continued unaltered. The evidence on this head did not amount to much, as reinsurances of this kind did not appear to be common; but there was some evidence of such custom.

The LORD CHIEF JUSTICE expressed his opinion to be that the question, whether the paper of November, 1851, was a signed statement as averred in the plea, was not a pure question of law for the Judge. He gave the defendants leave to move to enter a nonsuit if there was no evidence, and directed the jury to find a verdict for the defendants if they believed that the intention of the parties was that the paper of 21st November, 1851, was to be understood as a statement, on the part of the insured, that Count D'Orsay was at that time in good health; but that they should find for the plaintiff if they thought the intention was that the paper was to be understood as a statement on the part of the assured that the state of health of the Count, at the time the original policy was effected, was shown by the Britannia papers, to which the defendants were referred, and that the defendants might make any further enquiries they pleased.

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He directed them, in framing their verdict, to consider *the whole

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of the circumstances ; the evidence of custom as to reassurance ; the form of the policy, which was partly printed, partly written ; the manner in which the printed proposal had been filled up before Mr. Foster affixed his name ; the way in which that name was, by the bracket, apparently confined, as a signature, to the reference to the Britannia papers ; and the fact that there were several blanks not filled up. He expressly told them that if the question was one of law their finding would be reviewed, but that if it was one of fact their verdict would be final : at the same time he did not conceal that in his opinion the weight of evidence was much in favour of the plaintiff. Verdict for the plaintiff.

Sir A. J. E. Cockburn, Attorney-General, in last Michaelmas Term, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved, or for a new trial on the ground of misdirection, or that the verdict was against the weight of evidence.

Willes showed cause :

The only question at the trial was whether there was a warranty, on the part of the plaintiff's Company, that Count D'Orsay was in good health in November, 1851. The plaintiff disclaims making any point on the ground that the whole directors or trustees do not sign : the Company agree that whatever Mr. Foster, the managing director, warranted or signed is to be taken as if warranted or signed by the whole directors, or trustees. The question is therefore reduced to this : Whether the paper of 21st November, 1851, was a warranty by Mr. Foster that Count D'Orsay was then in good health.

It is urged that the policy is conclusive on this matter : but that is not so. The recital there is, that there was a declaration in writing. The first enquiry, in all cases in which a written document refers to something extrinsic, is what is the particular thing referred to, a question to be answered by evidence. In the present case there can be no doubt that the recital referred to the paper which has been produced in evidence. Then comes the question, What is the nature of the thing referred to ? That depends, not upon the description contained in the referring document, but on the thing itself. If it answers all the description it is well ; if not, the inaccurate parts of the description are *falsa demonstratio*, and as such must be rejected. Here *constat de documento* : the paper is the one produced. Does it answer all the description in the policy ? That is, is it signed by the assured, and is it touching the then present state of health of Count D'Orsay, or is there misdescription

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in these respects? To answer that, the paper itself must be looked to. If there had been no name at all attached to the paper, it could not have been said that the recital proved that it was signed. There is here a name attached; and the question is whether that was a signature to the whole paper, or not. And the first point is, whether that was a question for the Court or the jury. It may be admitted that a name attached to a written instrument is, *primâ facie*, to be taken as a signature authenticating the whole of what appears on the face of the instrument; but it cannot be doubted that a name may legally be applied as the signature to part only; and, on the face of this instrument, the name written as it is at the foot of a particular sentence, "For these particulars *see copies of Britannia papers attached," purports to be intended to apply to the reference, and to that only. If it does not so purport it is, at the least, an imperfect, and ambiguous instrument, and the intention to affix the name as a signature to the whole is not clear. That is enough to make it a subject of enquiry, by means of circumstances *dehors* the instrument, what Foster intended to sign; which must be a question for a jury. * * If there was a question for the jury, it could be no other than the one put. * * *

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It is said that the recital in the policy operates as an estoppel on the plaintiffs. It must be admitted that, if it appears that the parties have agreed to proceed on a *contract that some fact shall, as between them, be considered to exist, and that they shall act on the faith of that agreement, there is an estoppel. And such an agreement may be shown by a recital. But in the present case the recital, by the defendants in their own deed does not show that the assured, who are not parties to the deed, ever agreed that a declaration should be taken as made: and, unless the defendants can go so far as to say there was such an agreement, there can be no estoppel.

Sir A. J. E. Cockburn, Attorney-General, and C. W. Wood,
contra:

The recital in the policy is that there has been a signed declaration touching the Count's present health which the assured have agreed to take as the basis of the contract. The assured receive that policy with that recital, pay the premium, and induce the defendants to become assurers on the faith that this recital is acceded to. They are therefore concluded from denying that there was such a declaration: *Pickard v. Sears* (1). If their conduct was not absolutely

conclusive, it was at least so nearly conclusive that the verdict is against evidence.

Supposing the question to be open, it was a question for the Judge, not for the jury. A signature may be written in any part of a document, and yet apply to the whole: *Knight v. Crockford* (1), *Saunderson v. Jackson* (2). That being so, the Judge, as a matter of law, ought to have decided that the signature of Foster applied to the whole. It was therefore a misdirection to leave anything to the jury.

Cur. adv. vult.

The COURT being divided in opinion, the learned Judges delivered judgments *seriatim*.

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WIGHTMAN, J. :

This was an action by the plaintiff, representing the Britannia Mutual Life Association, against the defendants, upon a policy of assurance upon the life of Count D'Orsay. The declaration was in the usual form, reciting the policy, and that the trustees of the assured had caused to be delivered into the office of the defendants a declaration in writing, signed by them, setting forth the age, and past and present state of health, and other circumstances, touching the habits of life of the person on whose life the assurance was to be effected; and that, if any thing averred by the said trustees in the said declaration was untrue, the policy should be null and void. It was then averred that the said trustees did not, in any manner, declare to the defendants, in any declaration in writing or otherwise, any thing that was untrue. The defendants pleaded, that the trustees did declare to the defendants, in the declaration mentioned in the policy, something that was untrue, that is to say, that at the time of delivering the said declaration into the office of the defendants the said Count D'Orsay was in a good state of health: and issue was taken upon the allegations in the plea.

There was no doubt but that, at the time the declaration was delivered at the defendants' office, Count D'Orsay was not in good health, but was affected by the disease of which he died soon after; and the only question at the trial was, whether the trustees, in the declaration mentioned in the policy, represented Count D'Orsay to be then in a state of good health, that is, at the time of delivering the declaration to the office of the *defendants. It appeared, by the evidence at the trial, that the declaration referred to in the policy

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(1) 5 R. R. 729 (1 Esp. 190).

(2) 5 R. R. 580 (2 Bos. & P. 238).

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was not in fact signed by the trustees, but by the plaintiff, who was the resident director of the Britannia Mutual Life Association. It was however hardly disputed but that Foster was the agent of the trustees for the purpose of the declaration, and that what he did and signed upon that occasion bound the Britannia Mutual Life Association, and the trustees, as fully as if they had acted and signed themselves. Assuming, then, that the signature of Foster pledged the Company, as completely as if the trustees had themselves signed the declaration, the question is, What did Foster sign, and to what did he pledge the trustees, and the Britannia Mutual Life Association? The document, which is called a declaration, is in two parts; the first being a series of nineteen questions to be answered by the persons to be assured; and the second a declaration to be made by the person whose life is to be insured, that he is, at the time of making the declaration, in a good state of health; with a further declaration by the parties to be assured, that, if the preceding declaration or their answers to the questions be untrue, the insurance will be void. Both parts of the document are on the same side of one sheet of paper. The assurance proposed to be effected by the Britannia Mutual Life Association with the defendants was in fact a reinsurance, the Britannia Company having, in 1845, granted a policy of assurance upon the life of Count D'Orsay to a larger amount than that which they proposed to assure with the defendants. When the proposition to assure was made, the defendants sent to the Britannia Mutual Life Association the document in question partially filled up by themselves: *they had, from their own knowledge, given the answers to the first five questions; but the twelve following questions were included in a circumflex, against which was written, at the side of the paper, "For these particulars see copies of Britannia papers attached;" and, at the foot of these words, the plaintiff Foster signed his name, but no where else. The blank, left for the signature of the person, whose life is to be insured, to the declaration to be made by him, was not filled up, nor was it signed by Count D'Orsay; nor was the blank left for the signature of the party to be assured, vouching for the truth of the declaration and of the answers to the questions, filled up, but remained in blank, as when sent by the defendants to the plaintiff's office. The real question upon the issue was, whether the Britannia Mutual Life Association had, in the document referred to in the policy, represented Count D'Orsay as being in good health at the time of delivering that

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document to the defendants. But, to determine this question, it seems to have been considered necessary to determine a previous one, namely, Whether the party signing the document intended his signature to be to the whole, or only to the part against which it was placed; and this was the question, in substance, which was left to the jury; and the point now to be determined by us is, Whether, in our opinion, there was any misdirection in the manner in which that question was left to the jury, or in the leaving it to them at all.

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The defendants, by the recital in the policy, show that they considered that the trustees, by the signature of Foster in the place where it was in the document, did make a declaration as to the then existing state of health of Count D'Orsay; and, as the Britannia Mutual Life *Association accepted the policy with that recital in it, without denial or explanation of it, and the action is brought upon the very instrument containing the recital, one question, and that a most important one in this case, is, whether they are not bound by it, and concluded from denying now that they did make a declaration of the then present state of Count D'Orsay's health. The document referred to, if the signature is to be taken as applicable to the whole, is not incapable of such a meaning: and, if it may be so construed, and the Britannia Mutual Life Association have, by allowing the defendants to deal with them as if it was to be so construed, assented to such construction, and by means of it have obtained that which the defendants might not otherwise have been disposed to give them, it appears to me, upon the principle of the decision of *Pickard v. Sears* (1) and some later cases founded upon it, that the Britannia Mutual Life Association are, *prima facie*, concluded, and cannot be allowed now to deny that they did mean the declaration to apply to the existing state of Count D'Orsay's health, or that the signature by Foster applied to the whole document. But, though in some sense the Britannia Mutual Life Association may be said to be concluded by the recital, it is not an estoppel, nor a conclusion in point of law; it may have been founded on mistake or be capable of explanation; and I do not think that there is enough to warrant a rule absolute for a nonsuit. But it appears to me that the circumstance of the Britannia Mutual Life Association having accepted the policy with that recital was not sufficiently, if at all, pressed upon the *attention of the jury; and that upon that ground, and without reference to the other points taken upon the motion for the rule, there should be a rule absolute for a new trial.

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(1) 45 R. B. 538 (6 Ad. & El. 469).

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ERLE, J.:

Assuming the pleadings and evidence to be as stated by my brother WIGHTMAN, I have come to the conclusion that the plaintiff's case failed at the trial on several grounds.

As he sues upon a written contract, he is a party to it, as much as if he had signed it, and cannot by parol evidence contradict or alter the stipulations therein. In that written contract, namely the policy, it is stipulated that the plaintiffs had delivered in to the defendants a declaration in writing, setting forth, *inter alia*, the present state of Count D'Orsay's health, and that, if the declaration was untrue, the promise of the defendants was void. The parol evidence was offered to show that the plaintiffs had not delivered in to the defendants any such declaration in writing, so setting forth the present state of the health of Count D'Orsay. It seems to me that the attempt was thereby to contradict the written agreement, and to alter the promise of the defendants from conditional to absolute. The question of signing is only material to identify the alleged declaration. When the paper containing it was identified, the question of signature was not of the essence of the stipulation: but the question of such a declaration so setting forth the present state of Count D'Orsay was material, and could not be denied by the plaintiffs.

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If the stipulations are changed into the form of an executory agreement, the declaration might run thus: "In consideration that the plaintiff would deliver such *a declaration, and would undertake it was true, and would pay a premium, the defendant promised to insure." The plaintiff could not recover on such a contract, without averring that he had delivered such a declaration, and that it was true; and, if the stipulations of the deed are analyzed, the delivery of such a declaration will appear to be equally indispensable for the plaintiff; and, if he delivered none such, the defendants' promise did not attach, and the plaintiff would fail.

Supposing this ground not to be tenable: I am further of opinion that the plaintiffs were concluded from setting up at the trial that they had not made such a declaration. The defendants sent to the plaintiffs for signature such a declaration, so setting forth the state of Count D'Orsay, and received it back with a signature at the side; and the defendants recited in their contract that the plaintiffs had delivered in such a declaration, and that they acted on the fact so recited; and they promised only on condition it was true. The plaintiffs, by accepting that promise, induced the defendants to act

on the belief that the declaration had been so delivered in as recited ; and plaintiffs obtained the deed by reason of that belief : then, in claiming a benefit under that deed, they are concluded from denying the fact which the defendants informed them was the basis of their promise. The case of *Pickard v. Sears* (1), and many cases founded thereon, have carried this doctrine much further than is required for the purpose of the present defendants. The effect of the words “concluded from denying” has never been settled. Perhaps the effect is that the principle ought to be explained to the jury, and *they should be told as matter of law that, as against the party

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who authorized the belief, they are bound by law to find the fact to be as the opponent under the supposed circumstances believed, and if they found otherwise to set aside the verdict. But, whatever be the correct mode of acting on that principle, it was not brought forward at all on the trial.

I would further observe that the evidence of other contracts made by other offices was inadmissible, as irrelevant towards proving the meaning of the contract made between these parties. The contracts which other offices have made are not evidence against the Mentor to prove this contract. If it be admitted, none would seem to be at all applicable except reassurances after an equal interval from the original assurance, as of course the probability of an alteration in the risk, and the need of a fresh declaration, is in direct proportion to the length of that interval. Of such reassurance there was to my mind very little satisfactory evidence.

After the course pursued at the trial, I am not prepared to say that a nonsuit should be entered now, though it appears to me that the only two questions for the jury must be answered for the defendants, and the construction of the written instruments must also be in the defendants’ favour. But I am of opinion that the verdict for the plaintiffs ought not to stand, and that therefore the rule for a new trial should be absolute.

COLERIDGE, J. :

In this case three points are made for the defendants. First : that they were entitled to enter a nonsuit. Secondly : that the jury were misdirected. Thirdly : that the verdict for the plaintiff is contrary to or against the weight of evidence. It is necessary, with *a view to the decision on each of these points, to look to the declaration and issue as well as the evidence in the cause.

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It is an action by the trustees of the Britannia Mutual Life Association against the Mentor Life Assurance Company, to recover upon a policy, effected by the former with the latter, on the life of Count D'Orsay. In the declaration, stating that such policy had been effected, the plaintiffs state that it was therein recited that they had caused to be delivered into the defendants' office a declaration or statement in writing signed by them, bearing date 21st November then last, setting forth the age and past and present state of the Count, and other circumstances touching his habits of life; and that they had agreed that the said declaration or statement should be the basis of the contract between them. The declaration also sets out a provision in the policy, that, if anything averred by the trustees in the alleged declaration so recited, and alleged to have been made by them, was untrue, the policy should be null and void. The declaration also contains an averment that the said trustees did not, nor did the said Britannia Mutual Life Assurance Association, aver or declare to the defendants anything that was untrue, in any declaration in writing, or otherwise howsoever.

The defendants plead that the trustees and the association did aver and declare to the defendants, in the said declaration mentioned in the said policy as agreed to be the basis of the said contract, something that was untrue, that is to say, that, at the time of the delivery of the said declaration into the office of the defendants, the said Count D'Orsay was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas he was not then in a good *state of health, but was then afflicted with a disease and disorder tending to shorten life. The plaintiff takes issue on the whole plea.

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Three questions are involved in this issue. Did the trustees deliver a signed declaration? Did that declaration state Count D'Orsay to be at the time of such delivery in a good state of health, free from any disorder tending to shorten life? If such declaration were delivered containing such statement, was that statement true? And it is not denied that in fact it was untrue: so that the substantial questions for determination at the trial were reduced to the first two.

Upon the trial it appeared that the policy in question was one of reinsurance, effected in December, 1851, for 1,500*l.*, the original policy for a larger amount having been effected in 1845. That this was one of five policies of reinsurance offered to the defendants together, all or none to be accepted, on five several lives. Some

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parol information was given as to each ; and the Count's was represented as a notoriously first class life. It was shown that the defendants had given to the plaintiff a paper headed in the upper part "Proposal for Assurance;" in the lower, but on the same side, "Declaration." The part headed "proposal" contained nineteen questions with blank spaces left for the answers; these questions were the ordinary ones, as to the age, condition, health, past and present, the having, or not having had, certain specified disorders, the habits and medical attendant of the life to be insured, the having, or not, received recently advice from any other person, and required the name and residence of some intimate friend. To the first five questions, which had no reference to health, or habits, or medical advisers, specific answers *were given on the paper: all the succeeding questions, excepting the last as to the intimate friend, appeared to have been inclosed within a circumflex; and across the blank space opposite them was written "For these particulars see copies of Britannia papers attached:" and, under this, came the signature of the plaintiff, "E. R. FOSTER, Resident Director, 21st Nov., 1851." No answer was given to the nineteenth question. Under the part headed "Declaration" came first a statement with a blank which was filled up in writing with the words "Count D'Orsay," and which purported to be a declaration by him that he was then in a good state of health, and was not then afflicted with any disease or disorder tending to shorten life; that the above statement of his age, health and other particulars was true, and that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous. Secondly followed "And we the trustees of the Britannia Life Assurance Company" "agree that this declaration shall be the basis of the contract between us and the Mentor Life Assurance Company; and that if any untrue averment is contained in this declaration, or in the answers above given," the assurance shall "be absolutely null and void."

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Then came the words :

"Signed at _____ this 21st day of November in the year of our Lord 1851.

Signature of party whose life is to be assured _____

Signature of party in whose favour policy is to be granted _____

Witness _____."

None of these blanks were filled up. The defendants contend

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that this paper, upon admission of the plaintiff's *handwriting, and of its delivery to the defendants, presented no question, except for the Judge, and that he was bound so to construe it that a nonsuit thereon ought to have been entered, or a verdict for the defendants, upon these grounds, substantially, that, it being immaterial on which part of a paper the party to be charged by it signs his name, the plaintiff's signature must be taken conclusively to apply to the whole paper; and that the reference to the Britannia papers attached did not import that they were to be looked to only to ascertain what the state of Count D'Orsay's health and habits were in 1845, when they had been given, but brought down those answers to the then present time.

Now, as to the first of these points: I apprehend it cannot be laid down, simply and without qualification, that it is immaterial in what part of a paper you find the signature of the party to be bound by it: it is rather true to say that, if you find it at the foot of the matter written, it is to be taken conclusively to apply to the whole, unless there be something expressly to rebut that presumption; and that, if you find it any where else, it may apply to the whole, if upon the evidence you find that the party signing so intended. Where the intention to sign is found, and the signature is so placed as apparently to apply no more to one part than another, there can be no reason *prima facie* to consider it otherwise than as intended to apply to the whole; but, where the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion is still purely one of intention. Now, wherever that question arises, it must be for the jury. These principles I think may be collected from the decisions on the *Statute of Frauds both as to wills and contracts. Thus in *Right*, lessee of *Cater v. Price* (1), where a testator had signed the two first sheets of his will, and attempted to sign the third, but from weakness could not do it, this was held no execution: Lord MANSFIELD said that the testator, "when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole." But in *Winsor v. Pratt* (2), where a will on one sheet concluded by stating that the testator had signed his name to the two first sides and put his hand and seal to the last side, and he did put his name and seal to the third side at the end of the will, but did not sign his

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(1) 1 Doug. 241.

(2) 2 Brod. & B. 650.

name to the two first sides, the COURT, supporting the execution, recognised the preceding case, and distinguished it. "There," said DALLAS, Ch. J., "the intention of the testator was defeated by incapacity; here, the act of the testator points to nothing prospective; and, whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention." Again, in *Johnson v. Dodgson* (1) the defendant, being the buyer of hops, wrote in his own book a sold note beginning "Sold, JOHN DODGSON;" and this, at his request, the seller's traveller signed. In an action for goods sold and delivered this was held a good signature by the party charged, Lord ABINGER saying: "The cases have decided that, although the signature be in the beginning or the middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as *it stood, or whether it was left so unsigned because he refused to complete it." The cases in which a printed name has been held a good signing are to be supported on the same principle; and the intention is inferred from the habit, or from other circumstances to be found in them. If then this was a question of intention, and there was any evidence of intention, the learned Judge could not properly withdraw it from the jury: and it seems to me that there was such evidence in the circumstances of the whole transaction. For this was not an ordinary case. Five lives were offered in the lump: one was confessedly a bad life; with regard to three some special information was afforded; and, as to one of these, Mr. Brooke, his absence precluded the ordinary references. As to the life in question, he was honestly represented as so notoriously good a life that the ordinary enquiries may well have been deemed unnecessary. He too was abroad; and it was probable he would not have troubled himself to answer questions, having no interest in the policy being effected. Altogether it was a case of circumstances from which a jury was to determine whether there was an intention by the signature, found where it appeared on the paper, to sign and be bound by the whole instrument. In the light in which I view the case, as standing on its own peculiar circumstances, I do not rely on the evidence of usage. It seems to me rather that it was not one on which the evidence was admissible; and the evidence in fact admitted appears to me to have amounted to nothing of any substance. But this is

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(1) 46 R. B. 733 (2 M. & W. 653).

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not material upon the present rule; the first ground for which I think fails for the reasons given.

Secondly. As to the direction. Supposing the question *of signature to have been for the jury, I do not see how it could have been properly left to them, except as one of intention, to be collected from the paper itself, and all the circumstances stated by the witnesses; and this I understand to have been in substance what was done at the trial. It is not inconsistent with this, that a question of construction as to part may have been mixed up, as to which the Judge was to give his opinion; and, if he gave the jury what appears to us a wrong opinion, that might amount to a misdirection. On more grounds than one, it was certainly important for the jury to know what was the meaning of the answer to the questions included within the circumflex. Did it relate to the Count D'Orsay's state in 1845, or in 1851? Undoubtedly the words may admit of either interpretation. The learned Judge thought that the former was the true one; and, after much consideration and some doubts, I am not prepared to say that he was wrong. It is impossible, I apprehend, to form an opinion upon this without reference to the circumstances under which the words were used. These do not lead me to believe that the plaintiff intended to warrant a continuance, at the date of this policy, of all those particulars stated in the answers of 1845, but only that the particulars were true at the time when they were stated. Upon the general question whether the whole paper was signed, it was objected that the learned Judge spoke too decidedly. Seeing nothing wrong in the opinion he expressed, that would be no objection with me, unless he thereby took the matter out of the hands of the jury; but, according to the notes, that cannot be said. He gave his opinion, but put all the facts before them for their consideration.

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It only remains upon this point to consider, whether *the circumstances precluded the plaintiff from denying a signature of the whole paper in the sense contended for by the defendants: if they did, the direction was not right. I am clearly of opinion they did not. And this must follow from the conclusions to which I have already come. The argument for the defendants, on this point, is to this effect. The policy, on which the plaintiffs' claim rests, recites that the plaintiffs have caused to be delivered to the defendants a declaration in writing, signed by them, setting forth the past and present state of health and other circumstances touching

the habits of life of the Count D'Orsay : these words are the words of the defendants ; but they show their understanding of the transaction ; the plaintiffs allow them to use them ; and, on the faith of this, the defendants enter into the contract : the plaintiffs, therefore, cannot now deny that such declaration was made. I should be very sorry to do anything that should break in upon the wholesome principle laid down in *Pickard v. Sears* (1) : but it seems to me that it would be going much beyond that principle if we were to apply it to the facts of this case. What are they ? I must now assume that no such declaration was in fact made, and that the plaintiffs' proposal for insurance has been accepted on the faith of a different declaration, limited in its extent, and not signed at all ; that this fact is known to the defendants as well as to the plaintiffs ; and, this being so, that the defendants in the printed part of a policy, using the ordinary words of such policy, knowingly or with means of knowledge, misrecite the plaintiffs' declaration, which misrecital the plaintiffs pass over, accept the policy as *worded, and pay the premium. I am not supposing that the binding parts of a policy are to have less effect when printed than when written ; but, in applying a principle the foundation of which is natural equity, all the facts of the case are to be looked to ; and this is one of them. Now, upon these facts, it seems to me that it would be unjust and unreasonable absolutely to conclude the plaintiffs from denying the truth of this recital. It would be applying a principle framed to advance the ends of justice in exactly the opposite direction. The permitting the misrecital to pass without objection is an argument fairly to be used for the defendants against the plaintiffs' construction ; but it is no more, and in my opinion not strong enough to weigh down all the opposing argument.

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Upon the remaining question—the propriety of the verdict—I need say nothing in addition to what I have already said on the former points. From this it follows that at least I cannot consider the verdict one which the Court should interfere to set aside. I think therefore the rule ought to be discharged.

LORD CAMPBELL, Ch. J. :

I am of opinion that this rule for entering a nonsuit ought to be discharged.

The issue was, whether the plaintiff's Company did aver and declare to the defendants, in the declaration mentioned in the

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policy, that, at the time of the delivering of the said declaration into the office of the defendants, Count D'Orsay was in a good state of health, and not affected with any disease likely to shorten life. The fact was admitted that, unknown to both parties, Count D'Orsay, when the policy was executed, was affected by a disease likely to shorten *life; and the verdict depended upon the proof of the alleged guarantee that he was then in good health.

I conceive that the defendants were bound to produce the document referred to in the recital of the policy, and to show that, by this document, the Britannia Mutual Life Association did give the alleged warranty. If this had depended upon the mere construction of the document, it would have been a pure question of law, and the Judge, upon its being produced and proved, ought to have directed how the verdict should be found, or that the plaintiff should be nonsuited. But, looking at the document, a question of fact arises, whether that part of it which is supposed to contain the guarantee is to be considered as signed by the assured. I cannot think that the recital, by the defendants in the policy, that it was so signed, is binding on the assured. Suppose that no signature had appeared upon any part of it, and that it had been a mere printed form, with none of the blanks filled up, surely the plaintiff would not have been precluded from contending that it was not signed, or from showing that the defendants had agreed to take upon themselves the risk of Count D'Orsay continuing an insurable life. It seems to me, that the doctrine of estoppel does not apply to such a transaction, and that we are bound to see whether in truth the declaration was signed by the directors, and what it imports.

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Looking to the document itself: in the place for "signature of party whose life is to be assured" no signature appears; and in the place for "signature of party in whose favour policy to be granted" no signature appears. On another part of the document there is the signature of one of the directors; but I *think it is impossible to say, as a matter of law, that the signature applies to that part of the document which contains the unsigned declaration in the name of Count D'Orsay. If it had been a question for the Judge, I should certainly have said that Foster's signature did not apply to this, and that the document, as it stands, would have no more effect than if that part of it entitled "declaration" had had none of the blanks in the printed form filled up in writing, or if this part of the document had been entirely wanting. From the place where Foster's signature is found, and the circumflex denoting

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to what it does apply, with the words above the signature, "For these particulars see copies of Britannia papers attached," I should infer that the proposed guarantee as to the present state of health of Count D'Orsay was repudiated by the Britannia Mutual Life Association, and that the directors of the Mentor Company, after having examined the papers showing Count D'Orsay's state of health when the original policy was effected, were left to draw their own conclusions as to his present state of health, and to take the risk of the Count's health continuing good down to the date of the new insurance. Considering the doubt as to whether the declaration be signed as the defendants allege, I likewise think that some regard may be paid to the evidence of usage upon a reinsurance. This was not objected at *Nisi Prius*, nor upon the motion for a new trial; and, if admitted, the jury were to determine what effect it was entitled to. An observation has been made that the evidence was only parol, and that the policies referred to by the witnesses were not produced. But it has often been held that, although the contents of a particular document cannot be proved without its *being produced or accounted for, a mercantile usage, which refers to written documents, may be established by parol evidence; and, indeed, it could hardly be proved satisfactorily in any other way. Moreover, I conceive that the evidence, given on both sides, of the conversations and conduct of the parties while the transaction was going forward might be taken into consideration in determining whether the declaration was intended to be, and was understood between the parties to have been, signed by Foster. If there was any parol evidence, on which the issue was to depend, then, according to the well known rule clearly stated by PATTESON, J. in delivering the judgment of the Exchequer Chamber in *Moore v. Garwood* (1), the whole was for the jury. I do not know any principle or practice according to which, in this case, the signature of the declaration should have been left to the jury as a separate issue. No question arose, or could arise, for the Judge upon the construction of the declaration; for, if it was signed by the trustees of the Britannia, it amounted, and was admitted to amount, to an express warranty, in the very words of the plea, that Count D'Orsay was, on the 21st day of November, 1851, in good health, and was not then afflicted with any disease tending to shorten life. The doctrine of *Pickard v. Sears* (2) and *Freeman v. Cooke* (3), which we

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(1) 80 R. R. 738 (4 Ex. 681).

(3) 76 R. R. 711 (2 Ex. 654).

(2) 45 R. R. 538 (6 Ad. & El. 469).

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have lately had to consider in *Howard v. Hudson* (1), would have effectually estopped the Britannia Company from denying that they had given the warranty if they had stated that they had signed the declaration; for then they would have made a statement on which the Mentor *Company had acted and thereby incurred a liability to their prejudice. But, if the declaration was repudiated instead of being signed, there had been no statement by the Britannia Mutual Life Association which could be the foundation of such an estoppel; for the recital in the policy is a statement by the Mentor Company only; and, if the declaration was not signed by the directors of the Britannia Mutual Life Association, nor understood so to be, the Mentor Company cannot have acted upon any such belief. Indeed they knew full well that Count D'Orsay was then abroad, and that there never was any contemplation of his signature being affixed to it; and this was a preliminary to the signature by the party in whose favour the policy was granted. At the trial, the defendants attempted to prove that they granted the policy on the credit of a parol declaration by one of the Britannia directors that "Count D'Orsay was a notoriously good life." I am therefore of opinion that the issue resolved itself into a question of fact for the jury, and that we cannot direct a nonsuit to be entered, according to the leave reserved if the Court should think that the Judge ought to have directed a nonsuit at the trial.

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It is next contended that there was misdirection in the manner of leaving it to the jury: chiefly on the ground that the Judge used the expression that "the declaration was not signed by the trustees." But, in using that expression, he only gave the jury to understand that no signature was found where it ought regularly to have appeared: and, when the *Attorney-General* interposed during the summing up, suggesting that the writing of Mr. Foster, across the document, must be taken to be a signature of the declaration, *the Judge (according to the shorthand writer's note) observed: "I do not think so, because Mr. Foster has only signed 'For these particulars see copies of Britannia papers attached;' but the jury shall see the whole." Accordingly, *fac simile* copies of the whole paper entitled "Proposal for assurance" were put into the hands of the jury; and their attention was directed to the different parts of it, so that they might form a proper opinion whether the signature was intended, and understood between the parties, to apply only to a part, or to the whole. The signature therefore was left, with the

other facts in the case, for their consideration. Nor was any question of law left to the jury which the Judge ought to have determined; for they were not called upon to construe a written document, or to pronounce upon the intention of the parties from the language used.

If it be alleged that the supposed estoppel, or conclusive admission, ought to have been submitted to the jury, I answer, that no such point was made at the trial, and that if it had I think it could not be supported.

The ground of misdirection therefore seems to me to fail.

The remaining question for our consideration is, Whether the verdict was contrary to the evidence? In my opinion it was entirely according to the evidence, and according to the justice of the case. All imputation of fraud was disclaimed by the defendants: and, looking both to the written document and the parol evidence, I think the defendants, as far as the policies on Count D'Orsay and three others were concerned, were content to take these lives on the papers on which the *former policies upon them had been effected, at the ordinary premium according to the ages which they had respectively attained, with that on the Duke of Beaufort's life at the extraordinary premium of 20*l.* per cent.: receiving, in one cheque for 649*l.* 10*s.* 10*d.*, the premiums on all the five for the first year, and being satisfied to run the risk of any of the four lives having become less eligible than when the original policies were effected, by circumstances unknown to either party.

If the defendants had expected the warranty, one would imagine that they would have objected to the declaration when it was returned unsigned, and would have required it to be signed as upon an original insurance, before they executed the policy. The mere circumstance of their having used the printed form of policy adapted to an original policy, with the printed recital that the declaration had been signed by the assured, is not at all sufficient to induce me to infer that they believed they had obtained a warranty, such as would have been given by regularly signing such declarations as those upon which the original policies had been effected. In construing a policy of insurance the Court certainly cannot consider whether it be in writing or in print, or partly in writing and partly in print: but I think that the jury, in determining the fact, whether the declaration was understood between the parties to be signed according to the recital, would have been perfectly justified in taking into consideration that this policy was

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in a printed form adapted to an original insurance and not to a reinsurance.

Upon the whole, I am of opinion that a special jury of the city of London, gentlemen more familiarly *acquainted with such transactions than we are, have arrived at a right conclusion, and that their verdict ought not to be disturbed.

The Court being equally divided in opinion, the rule dropped.

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Jan. 12.

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(3 EL. & BL. 83—94 ; S. C. 2 C. L. R. 874 ; 23 L. J. Q. B. 107 ; 18 Jur. 552.)

Declaration stated that by deed between plaintiff and defendant, who were partners, it was agreed that plaintiff should retire from the partnership, and it should be referred to arbitration what sum should be therefore paid by defendant to plaintiff : that it was awarded that a sum named should be paid by instalments : but defendant had paid only a part thereof.

Plea : that, after breach of the award by non-payment of the first instalment, it was agreed between plaintiff and defendant that defendant should not assist one B. in a certain claim which he was urging, and that defendant should pay, by instalments on certain days named, the last but one being 14th April, a sum in all amounting to less than the sum awarded ; which agreement and the performance thereof plaintiff accepted in satisfaction of the sum awarded, and all causes of action in respect thereof, and the said breach : and that defendant paid plaintiff the instalments on the days named in the second agreement, which plaintiff accepted in satisfaction (as before), and in performance of the second agreement.

Held : that the deed of submission was merely inducement, and that the action was brought for breach of the award ; and that therefore there might be accord and satisfaction under an agreement by parol, made after the breach by non-payment of the first instalment : and, consequently, that the defendant, in support of his plea, was not bound to show an agreement under seal (1).

It appeared that the last payment but one under the second agreement was made on 19th April, not on 14th ; and that, when it was made, plaintiff refused to accept it except as on account of the money due on the award, which, he contended, was still binding : but he made no objection to the payment as having been made too late :

Held that the defendant had performed the second agreement, the effect of the transaction on the 19th being that the plaintiff agreed to take the payment as made on the 14th.

COUNT, setting out the effect of an instrument under the seal of the plaintiff and defendants, whereby, after reciting that plaintiffs and defendants had been partners in a contract with the Leeds

(1) A plea of accord and satisfaction by parol, whether before or after breach, is, since the Judicature Acts, a good answer to a claim on a specialty.

The arguments, which were mainly directed to the question whether a parol agreement was sufficient, are therefore omitted.—W. B.

and Thirsk Railway Company, and that disputes had arisen between the parties, and that it had been arranged that the plaintiff should retire from the partnership upon terms to be settled by arbitration, it was agreed, amongst other things, that plaintiff should retire from the partnership, *that defendants should relieve him from all liabilities, and take to them all the partnership assets; and that “the sum of money to be paid to the plaintiff for retiring from the said partnership as aforesaid, the time or times for payment thereof, and all other matters in difference between the said parties thereto touching the said partnership affairs,” should be referred to the arbitrament of two persons named in the deed, or, in case they should differ, to the arbitrament of an umpire to be named by the two arbitrators, whose umpirage and award the parties covenanted to adhere to. There was nothing in the deed requiring the award to be under seal. Averment: that the arbitrators duly appointed Stephen Robinson as umpire, and afterwards differed; and that Stephen Robinson, in November, 1850, duly made his award and umpirage in writing, and thereby awarded that defendants should pay plaintiff, for retiring from the said partnership, 5,008*l.* 17*s.* 10*d.* in manner following: 2,000*l.* on 1st January, 1851, 2,000*l.* on 1st April, 1851, and 1,008*l.* 17*s.* 10*d.*, being the residue, on 1st July, 1851. Averments of notice, and of the expiration of the time for payment. Breach: that, although defendants had paid the whole of that sum except 508*l.* 17*s.* 10*d.*, they had not paid 508*l.* 17*s.* 10*d.*

Plea: that, “after the making of the said award, and after a breach of the said award in the non-payment of the said first instalment of 2,000*l.* of the said sum so awarded to the plaintiff as aforesaid on the day on which the said first instalment was so awarded to be paid as aforesaid, but before any of the said further instalments of the said sum awarded had become due and payable, at the request of the plaintiff it was mutually agreed, by and between the plaintiff and the defendants, that *the defendants should not, either directly or indirectly, voluntarily assist one John Bage in establishing a partnership in either of the said recited contracts. And that the defendants should pay to the plaintiff, and the plaintiff should accept from the defendants, the sum of 4,500*l.* by instalments all of which were to be become due and payable before the day on which the last instalment of the said sum so awarded to the plaintiff as aforesaid by virtue of and according to the terms of the said award was to become due and payable: namely: 1,000*l.*, part of the said sum of 4,500*l.*, on the day of the

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making the said agreement; the sum of 1,000*l.*, further part thereof, in the month of February in the year 1851; the sum of 1,250*l.*, further part payment thereof, on the 14th day of April in the year aforesaid; and the sum of 1,250*l.*, residue of the said sum of 4,500*l.*, on the 14th day of June in the year aforesaid: in full satisfaction and discharge of the said sum so awarded to be paid as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award; and that the plaintiff should accept the said agreement, and the performance thereof by the defendants, in full satisfaction and discharge of the said sum so awarded to the plaintiff as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award: and the plaintiff then accepted the said agreement, and the performance thereof by the defendants, in full satisfaction and discharge of the said sum so awarded to him, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach.” Averment: that defendants did not assist John Bage, and that “they paid to the plaintiff the said sum of 1,000*l.*, the first *instalment of the said sum of 4,500*l.*, which the plaintiff then accepted in satisfaction and discharge of the said first instalment; and the said sum of 1,000*l.*, further part thereof, in the said month of February in the year aforesaid; and the said sum of 1,250*l.*, further part thereof, to wit on the 14th day of April in the year aforesaid, which the plaintiff then accepted in satisfaction and discharge of the said third instalment of the said sum of 4,500*l.*; and the said sum of 1,250*l.*, residue thereof, on the 14th day of June in the year aforesaid, in full satisfaction and discharge of the said sum so awarded as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award, according to and in performance of the said agreement on their part and behalf: and that the plaintiff accepted from the defendants the said sum of 4,500*l.*, and the payment thereof by the defendants by the said several instalments on the said several days and times in that behalf aforesaid, and on the several occasions on which the said several instalments were so paid to him by the defendants as aforesaid, in pursuance of the said agreement.”

Replication: taking issue on the plea.

On the trial, before Erle, J., at the last Durham Assizes, the *onus* being on the defendants, they began. It appeared that, after the

award was made, the defendants were dissatisfied with it, and did not pay the first instalment when due. Subsequently the plaintiff and defendants came to a verbal agreement to the effect set forth in the plea. The two first instalments of *1,000*l.*, under the substituted agreement, were paid by the defendants to the plaintiff. Before the 14th of April (when the third instalment under the substituted agreement became due), the plaintiff required the defendants to sign a letter concerning Bage's claim mentioned in the plea. This defendants declined to do, on the ground that it was no part of the agreement. The plaintiff received the payment of 1,250*l.* on the 19th of April, and a further payment of 1,250*l.* on the 14th of June. On each occasion he insisted on having the letter signed, but made no objection on the ground of the April payment being after date; and on each occasion an acknowledgment of the receipt of 1,250*l.*, "on account of the sum due under the award," was given. The acknowledgments were dated respectively 19th April and 14th June, 1851. Afterwards the defendants, in May, 1852, were induced to sign the required letter, and sent it to the plaintiff, who refused to receive it, and insisted on being paid 503*l.* 17*s.* 10*d.*, the balance of the original award after giving credit for the 4,500*l.* It appeared that it was no part of the agreement that the letter should be signed. The plaintiff's counsel contended that the plea was not proved, because the plea must be construed as averring a binding agreement, and a parol agreement to take satisfaction for the instalments not yet due under an award founded on a submission under seal was not binding. They also objected that the averment, that the last instalment but one, under the substituted agreement, was paid on the 14th April, was not proved, inasmuch as it was in fact paid on the 19th. The learned Judge directed a verdict for the defendants, subject to leave to move to enter a verdict for the plaintiff, on either of the above grounds, *it being taken as a fact that the payment on the 19th April was received by the plaintiff as for a payment on the 14th April. *Hugh Hill*, in the ensuing Term, obtained a rule *nisi* accordingly.

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Knowles and *Joseph Addison* showed cause. * * *

Hugh Hill and *Manisty* were heard in support of the rule. * * *

LORD CAMPBELL, Ch. J. :

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I am of opinion that this rule must be discharged. It was granted on two grounds: first, that the plea could not be proved

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without putting in evidence an agreement under seal ; 2ndly, that in fact the plea was not proved, even supposing an agreement not under seal was admissible. Both grounds fail. As to the first ground : after breach of the original contract, *there may be an agreement which, when performed, will show accord and satisfaction : and such an agreement need not be by deed. The action is for breach of duty in not performing the award ; but it is not, properly speaking, on the deed of submission. The defendant did not pay the first instalment according to the terms of the award ; after that default the parties entered into a new agreement. Now, when we look at the declaration, we see that the gist of the complaint is, not the non-payment of any particular instalment, but generally the non-payment of the sums awarded to be paid. After that duty had been broken, the new agreement was made, which is stated in the plea : and the plea, after stating it, alleges its performance : that the performance was, by the agreement, to be taken, and was taken, in satisfaction of the duty arising from the award and from the damages accruing from the non-performance of that duty. There was no necessity that such an agreement should be by deed. Then, secondly, as to the performance of the agreement in satisfaction. The performance, as to the instalment in question, is thus averred : that the defendants “ paid to the plaintiff ” “ the said sum of 1,250*l.* further part thereof, to wit on the 14th day of April,” “ which the plaintiff then accepted in satisfaction and discharge of the said third instalment of the said sum of 4,500*l.* : ” “ and that the plaintiff accepted from the defendants the said sum of 4,500*l.*, and the payment thereof by the defendants by the said several instalments on the said several days and times in that behalf aforesaid, and on the several occasions on which the said several instalments were so paid to him by the defendants as aforesaid, in pursuance of the said agreement.” On its face, the plea is clearly good.

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Then, *was it not proved, to the conviction of the jury, that such payment was made and accepted in satisfaction ? The money is given, on the 19th, to the plaintiff with his consent : is not that a performance of the agreement on which the accord is founded ? Can the plaintiff, after that, say that the defendants have not performed the agreement ? I am of opinion that this is abundant proof that the agreement of the defendants was performed both in form and substance.

COLERIDGE, J. :

The legal principle appears to be agreed upon by both sides. I

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am of opinion that the deed, which contains the submission, is mere inducement. There was a breach of it before the accord, by the non-payment of the first instalment. Then that lets in the plea as pleaded, that is, without any averment that the accord was under seal. As to the second point, the payment on the 19th was taken by the plaintiff without any objection as to its being made after the 14th. That amounts, in substance, to an agreement to treat it as a payment made on the 14th.

WIGHTMAN, J. :

I am of the same opinion on both points. The action is on the award: the deed of submission is mere inducement. Accord and satisfaction may take place under a parol agreement made after breach of a special contract: and here the non-payment of the first instalment was a sufficient breach, either of the award or of the covenant to perform it: and it is after that breach that the substituted agreement and its performance are accepted in satisfaction. Then the payment of the instalment under the substituted agreement was accepted as made on the 14th of April.

ERLE, J. :

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The question as to whether there could be accord and satisfaction under the substituted agreement depends on the question whether the action is brought on the award. Now the declaration is not founded on the deed of submission alone: and the accord and satisfaction is for the breach of the award, and may therefore be by parol. Then comes the question, whether the defendants have performed the substituted agreement. On the 19th the plaintiff accepted a payment as made on the 14th. If the performance is good in substance, that is enough; both time and place may be immaterial. Here the time was, I think, immaterial. The rule must therefore be discharged.

Rule discharged.

1854.

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NEWMARKET RAILWAY COMPANY *v.* ST. ANDREW'S THE LESS, CAMBRIDGE.

(3 EL. & BL. 94—113; S. C. 7 Rail. Cas. 858; 23 L. J. M. C. 76; 18 Jur. 572.)

By agreement between the E. Railway Company and the N. Railway Company (confirmed by Act of Parliament), the N. Company agreed to complete a branch of their railway communicating with the E. line, and agreements were made for the interchange of traffic, and the E. Company bound themselves, whenever the dividend of the N. Company, from their earnings on their whole line, fell below three per cent., to make good the deficiency to an extent not exceeding 5,000*l.*

The N. Company completed and worked the branch. The expenses of working the branch exceeded the gross receipts on the branch: but, the dividend of the N. Company from their whole line falling short of three per cent., the E. Company made good to them the deficiency amounting to 3,705*l.* On appeal against a rate for the relief of the poor in a parish through which the branch line passed, a case was stated in which the only question was, whether this payment ought to be taken into account in estimating the rateable value of the branch:

Held by COLERIDGE, J. and ERLE, J. that it could not be so taken into account.

LORD CAMPBELL, Ch. J., *dissentiente*.

On appeal, by the Newmarket Railway Company, against a rate for the relief of the poor of the parish of St. Andrew's the Less, Cambridge, a case was, under stat. 12 & 18 Vict. c. 45, s. 11, stated, by order of a Judge, for the opinion of this Court.

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The case stated that, in the rate appealed against, the Newmarket Railway Company were assessed as occupiers of land used as a railway of the gross value of 145*l.*, and of the rateable value of 116*l.*; and that the grounds of appeal were that this was an over assessment. It then proceeded as follows: "By the Newmarket and Chesterford Railway Act, 1846" (9 & 10 Vict. c. clxxii. (1)), "the appellants, by their then name of the Newmarket and Chesterford Railway Company, were empowered to make and maintain a railway, from the Cambridge line of the Eastern Counties Railway at or near Chesterford to the town of Newmarket, with a branch to the town of Cambridge. At the time of the making of the agreement next hereinafter mentioned, the appellants had made the said railway, which they were so empowered to make from Chesterford to Newmarket, but they had not made the said branch to Cambridge. By an agreement, bearing date and made on the 28th day of May, 1851, between the Eastern Counties Railway Company of the one part, and the appellants of the other part (a copy of which

(1) Local and personal, public: ford to Newmarket, with a branch to
"For making a railway from Chester- Cambridge."

accompanied and was to be deemed and taken as a part of the case), after reciting, amongst other things, that, in consideration of the benefit likely to accrue to the Eastern Counties Railway from the construction of the said branch, and the working of the railway of the appellants in connection with their railway, the Eastern Counties Railway Company were willing to secure to the appellants certain advantages as thereafter expressed and defined: it was mutually agreed between the Eastern Counties Railway Company and the appellants, amongst other things, as follows, viz.:

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"1st. That the appellants should proceed with all convenient dispatch to make and complete at their own expense the said branch railway, that is to say, from Little Field Road in the parish of Wilbraham to a junction with the Eastern Counties Railway at or near the Cambridge Station.

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"12th. That, whenever, after the opening of the said branch line and during the continuance of the said agreement, the net earnings of the appellants, after payment of working expenses and other charges upon revenue and interest on borrowed capital, should not be sufficient to pay a dividend on their share capital, or on any stock into which the same might be thereafter converted, equal to three per cent. per annum upon their capital of 350,000*l.*, the Eastern Counties Railway Company should and would, on notice and requisition to that effect by the appellants within a reasonable time before the day in each half year when the dividend should be made payable, pay to the appellants, or permit them to retain out of any moneys in their hands for which they might be accountable to the Eastern Counties Railway Company, such a sum of money as would be sufficient to make up the dividend to the said rate of three per cent. per annum: Provided that the whole sum payable or to be allowed by the Eastern Counties Railway Company to the appellants in any one year under or by virtue of the said agreement should in no case exceed the sum of 5,000*l.*

"18th. That the said agreement should continue in force for the term of ninety-nine years reckoned from the opening of the said branch line to Cambridge (1).

"After the making of the said agreement, and before the passing of the Act of Parliament hereinafter next mentioned, the appellants did at their own expense, pursuant to the said agreement, make and

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(1) The provisions in the agreement, not set out in the case, were for the mutual interchange of traffic, and

similar purposes, and did not qualify those above set out.

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complete the said branch railway to Cambridge in the said agreement mentioned; and the same was duly opened on the 9th day of October, 1851.

"By the Eastern Counties and Newmarket Railways Arrangements Act, 1852 (1), it was enacted that the said agreement should be and was thereby made and declared to be valid and binding on each of the said Companies."

The case then showed that the branch railway ran, partly, through the respondent parish, and that the rate in question was on the land in that parish which was occupied by the appellants as part of that branch. The gross earnings of the whole branch line amounted to 9,705*l.* 3*s.* 8*d.*, and the outgoings, which it was agreed were proper deductions, to 10,970*l.* 4*s.* 2*d.*: and it was agreed that the proportionate part of the gross earnings and outgoings belonging to the portion of the branch line in the respondent parish were respectively 404*l.* 7*s.* 8*d.* and 492*l.* 1*s.* 10*d.*, so that, merely looking to the receipts, the branch line was worked at a loss. The case then proceeded. "The net earnings of the appellants, after payment of working expenses and other charges upon revenue and interest or borrowed capital, not being sufficient to pay a dividend on their share capital equal to three per cent. per annum upon their capital of 350,000*l.*, the Eastern Counties Railway Company did, during the aforesaid period of one year immediately preceding the making *of the said rate, in pursuance of the provision above mentioned and contained in the said agreement of the 28th day of May, 1851, pay to the appellants two several sums, amounting together to the sum of 3,705*l.* 9*s.* 7*d.*, as and by way of a payment to the appellants, under the said agreement, to make up the dividend upon the said share capital to the said rate of three per cent. per annum.

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"It is contended by the respondents that the said sum of 3,705*l.* 9*s.* 7*d.*, so paid to the appellants, ought to be taken into account in ascertaining the annual rateable value of the said railway and branch railway. The correctness of the view so contended for by the respondents is denied by the appellants.

"The question for the opinion of the Court of Queen's Bench is, Whether the said sum of 3,705*l.* 9*s.* 7*d.*, so paid to the appellants as aforesaid, ought by law to be taken into account in ascertaining the annual rateable value of the said railway and branch railway,

(1) Stat. 15 & 16 Vict. c. li., "To confirm an agreement therein mentioned between the Eastern Counties

Railway Company and the Newmarket Railway Company."

and Whether the appellants were or are by law assessable to the said rate in respect of or upon that sum.

"If the Court shall be of opinion that the said sum of 3,705*l.* 9*s.* 7*d.* ought not by law to be taken into account in ascertaining the annual rateable value of the said railway, and that the appellants were not, or are not, by law to be assessed to the said rate in respect of or upon that sum, then the said appeal is to be allowed, and the said rate is to be amended by reducing each of the sums of 145*l.* and 116*l.*, which now appear upon the said rate as the 'Gross estimated rental' and 'Rateable value' of so much of the said branch railway as is situate within the respondent parish, to the sum of 21*l.*; and the said Court of Quarter Sessions shall and may adjudge accordingly; *and that the respondents do and shall pay to the appellants the sum of 20*l.* for costs.

"If this Court shall be of a contrary opinion, then the said appeal is to be dismissed; and the Court of Quarter Sessions shall and may adjudge accordingly; and that the appellants do and shall pay to the respondents the sum of 20*l.* for costs."

The case was argued by *Worlledge* in support of the rate, and *H. Hawkins* for the appellants.

The judgments render it unnecessary to report the argument.

Cur. adv. vult.

There being a difference of opinion, the learned Judges delivered separate judgments.

ERLE, J. :

The only question submitted to us in this case is, Whether, in rating the appellants to the relief of the poor for the portion of their railway in the parish of St. Andrew the Less, a sum of 3,705*l.* 9*s.* 7*d.*, paid to them by the Eastern Counties Railway Company, ought to be taken into consideration as adding to the rateable value.

By "The Newmarket and Chesterford Railway Act, 1846," the appellants were empowered to make a railway from Chesterford to Newmarket, with a branch to Cambridge. Having made the railway from Chesterford to Newmarket, but not the branch to Cambridge, and the Eastern Counties Railway Company, with whose line it was to communicate, desiring that it should be completed, the two Companies, on the 28th of May, 1851, entered into articles of agreement, by which, after reciting that the Eastern Counties Railway Company *were willing to secure to the Newmarket Railway

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Company certain advantages, it was stipulated that the Newmarket Railway Company should, with all convenient dispatch, make and complete the said branch to a junction with the Eastern Counties Railway at Cambridge, and that, whenever the net earnings of the Newmarket Railway Company should not be sufficient to pay a dividend equal to three per cent. per annum on their capital of 350,000*l.*, the Eastern Counties Railway Company would pay to the Newmarket Railway Company such a sum of money as would be sufficient to make up the dividend to three per cent. per annum, so that this sum should not exceed 5,000*l.*

The branch was accordingly made by the Newmarket Railway Company, and opened on the 9th October, 1851; and the agreement, which was entered into for 99 years, was, in 1852, confirmed by Act of Parliament. The branch railway continued to be occupied and worked by the appellants: and, the year preceding the making of the rate appealed against, the appellants were unable from their net earnings to pay a dividend of three per cent. upon their capital; and the Eastern Counties Railway Company paid them 3,705*l.* 9*s.* 7*d.*, under the agreement, to make up the dividend to three per cent. per annum.

The appellants contend that this sum ought not to be taken into consideration in assessing them as occupiers of the railway to the relief of the poor, as it is not an earning of their railway, nor rent, nor money in the nature of rent, paid for the use of the railway, but a payment arising from a contract of guaranty, and not derived from the profits of the occupation of the land. And I am of this opinion.

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The rateable value of the railway is, by the Parochial Assessment Act (1), the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and deducting the probable costs necessary to maintain it in a state to command such rent. If the railway was let, the amount of rent would depend on the amount of annual profit to be derived therefrom, and it would be immaterial to the tenant whether this exceeded or fell short of three per cent. on the cost price of the line; the cost of a construction does not indicate the profit to be obtained therefrom as a matter of fact; and it was decided in *Reg. v. Mile End Old Town* (2) to be no criterion in law of the rateable value of any property to the poor rate. If the purchaser of a farm had a guaranty that the rent should yield him three per cent. on the

(1) Stat. 6 & 7 Will. IV. c. 96.

(2) 74 R. R. 268 (10 Q. B. 208).

purchase money, the rateable value, that is the rent which a tenant would pay for the farm, would not be increased by this collateral contract between the landlord and the guarantor; now the Newmarket shareholders are, in effect, the landlords of the railway; the Company are the tenants paying dividend for rent; and the Eastern Counties Railway Company are the guarantor; and the contract of guaranty is irrelevant to the rateable value. Furthermore, the sum paid under the guaranty is not rateable, for it is not a parochial profit; nothing is due under the guaranty until the profits, upon both the Newmarket and Chesterford, and the Newmarket and Cambridge, lines, have been ascertained, when, if the sum total is less than 10,500*l.*, the guarantors must pay. I am not able to discover how the failure of profits, upon the parts of the line in distant parishes, becomes a *net profit, upon the part of the line in St. Andrew's the Less, for which a tenant of that part alone would pay rent. Indeed this parish offers as proof of the rateable value of the part in their parish that it is worked at a loss; that loss contributes to the general loss, and so to earning the deficiency of profit for which the guarantors pay: thus the parochial loss is, by reason of the guaranty, *pro tanto* a parochial profit; and, on this principle, the greater the loss in the parish the greater would be the parochial share of the payment made by the guarantor; which seems a strange result.

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Furthermore, the rate upon the sum paid under the guaranty is not legal; for it falls, not on the occupier, but the guarantor. The rate is, nominally, on the Newmarket Railway Company: but, if it is sustained, it must be paid by the Eastern Counties Railway Company, who agree to make good the deficiency in case the net profits after paying all deductions will not yield a dividend of three per cent. on the capital. In proportion as the deductions are increased, the net profits are less, and the deficiency to be made good is greater. The poor rate is one of the deductions to be provided for before any dividend is payable; and, if the 3,705*l.*, now required to make up the deficiency, be subject to poor rate, it will no longer yield the required dividend, but must be increased by the amount of that rate. Nay, if the principle is followed out, the guarantors will not only pay the poor rate on this deficiency, but that poor rate will, by the same process, become also profit, and also rateable value, and the subject of a further poor rate thereon. And these consequences, which may be followed further, also lead to strange results.

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With respect to the profits derived from the terms on which traffic is interchanged between the two Companies: *those profits are liable to be rated where they arise, and are not included in the present question: and it should be observed that the terms in the agreement are, throughout, a premium to the Newmarket shareholders to induce them to advance the necessary capital for making the line.

With respect to the argument from the expected amount of rent or profit: that may be presumptive evidence of the rateable value; but it is a presumption open to being rebutted; and, here, there is no room for presumption, as it is found by the case that the sum in question is not a profit derived from the railway in the parish, but a payment under a contract by reason of the absence of profit.

With respect to the argument from the tendency of the line of the Newmarket Railway Company to increase the profits of the Eastern Counties Railway Company: the Newmarket Railway Company are not liable to be rated for any profit, or tendency to profit, enjoyed by another Company: that Company must be rated for the profits they actually make in the parish where they arise: but no Company is liable to be rated for a supposed tendency to profit, not resulting in actual profit. The respective values of two rateable subjects may be increased by combining their operation; and, in that event, the rate will be increased accordingly; but the rate must be on the actual profit, when it arises, and not on a tendency to profit.

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I consider that this principle was laid down in *Reg. v. Great Western Railway* (1), where it was contended that a branch railway, yielding no profit, was liable to be rated on account of its tendency to increase the *profit of the trunk line, and the Court decided to the contrary, and, in so deciding, did not impair the principle that the rateable value of each of two rateable subjects may be increased by their combined operation, in case the aggregate of the profits from both is increased thereby.

On these grounds I have come to the conclusion that the sum paid under the contract of guaranty in this case was not rateable, and that the rate ought to be reduced accordingly.

COLERIDGE, J. :

The facts of this case have already been sufficiently stated; and it is unnecessary for me, therefore, to repeat them. And the

(1) 81 R. R. 636, 650 (15 Q. B. 1085).

question which they raise is, Whether a proportional part of a sum of 3,705*l.* 9*s.* 7*d.*, paid by the Eastern Counties Railway Company to the appellants, ought to be taken into account in assessing them as occupiers of land in the respondents' parish, on the ground that it forms part of the rateable value of that land. There can be no dispute as to the principle which is to determine this question; that money, or money's worth, should form part of the rateable value of land, it is not enough that the occupier should receive it, being the occupier, or even because he is the occupier; but it must directly or indirectly spring out of and be part of the fruits of the occupation. If the Marlborough pension, granted under stat. 5 Ann. c. 4, had been limited to John, Duke of Marlborough, and his heirs, occupiers of the Blenheim Estate, it would have been received by the Duke for the time being, in some sort because he was occupier; that is, if not occupier, he would not receive it; and yet, it never could have been considered as forming part of the *rateable value of the estate. It would not in that sense spring out of the occupation. This distinction was I think recognised by this Court in *Rex v. The Aire and Calder Navigation Company* (1), where the occupiers of certain mills in Hunslet received tolls, collected in a different township, as a compensation for loss of water by the work of an adjoining Navigation Company, and these were sought to be included in the rateable value of the mills, as increasing the value of the occupation of them. Lord TENTERDEN, delivering the judgment of the Court against the assessment, says: "Suppose that instead of the toll an annual rent had been given, or a sum in gross from which they derived an income? Could they have been rated in respect of that, as profit arising from their property in Hunslet?" There are special circumstances in that case which prevent me from considering the decision as a direct authority for the case before us: but the passage which I have cited from the judgment illustrates the distinction which must be kept in view.

The very nature of the distinction makes it rather difficult to apply it; and very small changes in the circumstances would make the case fall within one or the other branch of it. Thus, if the Eastern Counties Railway Company were under an agreement to pay absolutely a sum per head, in addition to the ordinary fare, for every passenger brought upon the appellants' line to be forwarded on their line, this would have been a sum received for the transit of such passengers, and would have been as much a part of the

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profits of the occupation as the ordinary fare which the passenger himself paid. But the substance of the actual agreement *seems to be rather that of a guaranty, which is not to come into operation till the actual fruits of the occupation fall below a certain amount.

The dividend on the capital is to be paid from the clear profits of the occupation; when they fail, the guaranty comes in, not to increase those profits, but to make the dividend good from another and independent and collateral source. But it is the profits, after deducting the proper outgoings, upon which the rate is to be assessed; and when that is done, and not before, it will be seen whether the guaranty is to operate or not.

In the present case, the total receipts fall below the outgoings. The line is worked to a loss: but suppose there had been a surplus sufficient for a dividend of two per cent., ought not the rate to have been imposed on that? and then, when the Eastern Counties Railway Company had under their guaranty paid one per cent., would not the distinction between the sources of the two and the one have been obvious, and would it not have followed that the latter ought not to be brought into the assessment?

This was an obligation which the Eastern Counties Railway Company, for the interest which it was conceived they had in the appellants' line being made and worked, took on themselves. Supposing it had, instead of being shaped in the present form, been by way of a large sum paid down on the completion of the line, which sum the appellants had set apart as a rest or reserve fund: and then, in any year, the dividend falling low, a sum had been voted from that rest, and applied in addition to the dividend, so as to raise it to a given amount: could it have been said that that addition *formed any part of the fruits of the occupation during the preceding six months? I think not; and yet I do not see how that case would have differed in principle from the present. The "rateable value" must always have been included in, and formed part of the "gross estimated rental;" and that gross rental must have been estimated before the process of deduction from it commenced. In the present case it might be perfectly clear, before commencing that process, that the outgoings would overtop the gross receipts; but it is by no means an unreasonable thing to suppose the gross receipts mounting so high as to make it impossible to say, beforehand, whether there would be any, and if any what, amount of clear profits, until the process of deduction had been gone through. The necessity then for recourse to the

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help of the guaranty would be contingent; and the addition ultimately to come from that source to make up the three per cent. dividend would be subsequent to the complete ascertainment of the two sums, the ascertainment of which was alone necessary to arrive at the rateable value.

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It will be said of course that, in order to arrive at the rateable value, a negotiation for a lease from year to year must be supposed, and that that negotiation must be supposed to proceed on the footing of the lessee being placed in exactly the same position as the present occupiers; and this is unquestionably true as to every thing which necessarily arises from the occupation. But, if thence it is inferred that the supposed lessee would necessarily, as such, have the benefit of this guaranty, it seems to me the very question in the case is begged. In point of fact, a lease of the line might very well be made, supposing the requisite powers, *without involving a transfer of the benefit of this agreement to the lessee.

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Suppose, at any six months' end, the accounts made up, and clear profits shown from which a dividend of two per cent. might be paid, the Eastern Counties Railway Company, upon application, refusing to perform their agreement and an action brought on it; I apprehend that, before such action brought, the course would have been to declare the dividend of two per cent., which would have been after deduction of the poor rate, and then to sue for the difference. Now the foundation of that action would have been the deficiency of those clear profits upon which the assessment must have been made; that is to say, in the words of the agreement, "the net earnings of the appellants, after payment of working expenses and other charges upon revenue and interest on borrowed capital." In this case it seems to me clear that, if the appellants succeeded in their action, and recovered in damages the difference sued for, that sum could not find its way properly into the rateable value: and I do not see any distinction in principle between that case and the present, as to the question before us.

The facts of this case are very peculiar, and will seldom form a precedent for any other. Upon the best understanding of them which I have been able to form, I think the appellants are entitled to our judgment.

LORD CAMPBELL, Ch. J.:

In this case, I have the misfortune to differ from my brothers COLERIDGE and ERLE: and, although their opinion must prevail, I

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consider it my duty to state the grounds on which, entirely concurring in the general principles which they lay down, I arrive at a different result.

The only question submitted to us is, whether in rating the appellants to the relief of the poor for the portion of their railway in the parish of St. Andrew's the Less, the sum of 3,705*l.* 9*s.* 7*d.*, paid to them by the Eastern Counties Railway Company, ought to be taken into consideration in estimating the rateable value.

The appellants were empowered to make a railway from Chesterford to Newmarket, with a branch to Cambridge. Having made the railway from Chesterford to Newmarket, but not the branch to Cambridge, and the Eastern Counties Railway Company, with whose line it was to communicate, considering that they would derive great benefit from its completion, the two Companies, on the 28th May, 1851, entered into articles of agreement, by which, after reciting that the Eastern Counties Railway Company were willing to secure to the Newmarket Railway Company certain advantages, it was stipulated that the Newmarket Railway Company should make and complete the said branch to a junction with the Eastern Counties Railway at Cambridge, and that, whenever the net earnings of the Newmarket Railway Company should not be sufficient to pay a dividend equal to three per cent. per annum on their capital of 350,000*l.*, the Eastern Counties Railway Company would pay to the Newmarket Railway Company such a sum of money as would be sufficient to make up the dividend to three per cent. per annum, so that this sum should not exceed 5,000*l.* The branch was accordingly made by the Newmarket Railway Company, and opened on the 9th October, 1851. This agreement, which was entered into for ninety-nine years, was, in 1852, confirmed by Act of Parliament. The branch railway continued to be occupied and worked by the appellants. In the year *preceding the making of the rate appealed against, the appellants were unable from their net earnings to pay a dividend of three per cent. upon their capital; and the Eastern Counties Railway Company paid them 3,705*l.* 9*s.* 7*d.* under the agreement, to make up the dividend to three per cent. per annum.

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The appellants contend that this sum ought not at all to be taken into consideration in assessing them as occupiers of the railway to the relief of the poor; alleging that it cannot be treated as the earnings of their railway, or as rent, or money paid in the nature of rent, for the use of the railway, and ought to be considered only as

an indemnity to the appellants, or a payment to them under a guaranty, unconnected with the occupation or enjoyment of land. But I am of opinion that, in assessing the appellants for the portion of the branch line which is in the limits of the respondent parish, this payment ought to be taken into consideration.

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I think it is received by the appellants in respect of their occupation of their railway, and is part of the profits of that occupation. It is evidently made in consideration of an advantage which the Eastern Counties Railway Company calculate that they derive from this branch railway from Chesterford to Cambridge. Whether it be a fixed annual sum or a sum depending upon a contingency, it is equally in respect of the use made of a railway occupied by the appellants, and, when received, it is part of the profits of that railway. If the Eastern Counties Railway Company paid the appellants a sum of money for being allowed to bring passengers in their own carriages from Chesterford to Cambridge gratis, that these passengers might be carried on the Eastern Counties line, for hire, from Cambridge to London, little doubt can be entertained that such a payment would be part of the profits of the branch of the appellants: and it seems to make no difference that the payment is made in respect of passengers brought from Chesterford to Cambridge in carriages of the appellants, the Eastern Counties Railway Company deriving the same profit from conveying them forward to London. The railway, within the respondent parish, is rendered more valuable and productive by something connected with the use of it in another parish, and, according to decided cases, its rateable value within the respondent parish is thereby enhanced.

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By the 7th article of the agreement: "In respect of all traffic, whether of passengers or of goods which the Newmarket Railway Company shall bring from any part of their railway, distant more than four miles from the Cambridge station, to Cambridge, to be carried upon the Eastern Counties Railway to" certain places enumerated, "the Newmarket Railway Company shall be entitled to retain, out of the tolls, rates and charges received by them upon such traffic, sixty per cent. of the gross amount thereof." The percentage of the tolls so retained would clearly be part of the profits of the branch, in respect of which the appellants would be liable to be rated; and the effect would not be different if the right of retention had been made to depend upon the contingency of profits of the Newmarket Railway Company not being otherwise sufficient to

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enable them to pay a dividend of three per cent. upon their capital. Again, suppose that, with a view to make the branch a more effective feeder to the *Eastern Counties line from Cambridge to London, it had been stipulated by the agreement that the Newmarket Railway Company should bring goods and passengers at very low rates from Chesterford to Cambridge, the Eastern Counties Railway Company undertaking to make up the deficit if the net profits did not enable the Newmarket Railway Company to pay a certain dividend on their capital: surely a payment to make up the deficit ought to be included in the gross earnings of the branch in estimating its rateable value; and, for this purpose, there seems to be no difference, on principle, between such a payment and that which we have here to decide upon. It is admitted that, if the Eastern Counties Railway Company had agreed absolutely to pay the appellants so much a head for every passenger carried from Chesterford to Cambridge, and travelling on by the Eastern Counties Railway to London, such a payment would be part of the earnings in respect of which the appellants would be rateable. Could any difference be made by a proviso that this payment should not exceed the sum necessary to make up a dividend of three per cent. to the shareholders of the Newmarket Railway Company, and that, such dividend being made up, the payment should cease? While the payment goes on to make up the dividend, it still seems to be part of the fruits of the occupation of their railway by the appellants, and I conceive that it must be taken into account in estimating the assessable value of the railway. But all the difficulties, pointed out in bringing the payment in question into account, might be urged against bringing into account the supposed payment which appears so clearly to be an ingredient in the assessable value. While such payments continue, I do *not see why they are less profits of the railway because, upon a contingency, they may cease. If this branch were let to a tenant he would be entitled under the agreement, and the Act of Parliament confirming it, to this contingent payment; and no doubt it would enhance the amount of the rent which as a tenant from year to year he would be willing to offer for it.

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I have only further to observe, in answer to an objection raised at the Bar, that in my opinion the contention of the respondents does not lead to the double rating of the same profits; for, if the Newmarket Railway Company were rateable in respect of a payment made to them under this agreement, or under an agreement whereby

the Eastern Counties Railway Company undertook to pay them absolutely a certain sum for each passenger brought from Chesterford to Cambridge, the Eastern Counties Railway Company would be entitled to a deduction in respect of such payment from their gross earnings when the assessable value of their railway comes to be estimated. I wish to adhere to the recent, as well as the earlier, cases on this subject, with this caution, that, when we were determining that in rating railways the parochial not the mileage principle was to be adopted, the Court did not mean to intimate that the assessable value of land in one parish might not be increased by a profit derived from it by the occupier, as occupier, in consideration of an advantage derived from it in another parish.

Upon the whole, my opinion is in favour of the respondents. But there must be

Judgment for the appellants.

LUMLEY v. GYE.

(3 EL. & BL. 114—128; S. C. 2 C. L. R. 936; 23 L. J. Q. B. 112; 18 Jur. 466.)

A commission, under stat. 1 Will. IV. c. 22, s. 4(1), issued at the instance of the defendant, directed to an English barrister, to examine witnesses in Germany. The witness, a Prussian subject, being at Berlin, the Commissioner went thither, but learned that, by the Prussian law, an oath could be administered to a Prussian subject only by a Prussian Judge, or some one authorized by a Prussian Court. On the petition of the Commissioner, a Prussian Court authorized D., a Prussian, to administer the oath. On the commission being opened, D. insisted on assuming the control of the whole examination, and rejected a question put conformably to the English law, on the ground that it could not be put conformably to the Prussian law. The parties then refused to act further under the commission.

The Commissioner returned these facts: and application was then made by the defendant, for a new commission, to be directed to a Prussian Court or Judge, without the clause requiring the Commissioner to be sworn. From the affidavit in support of the rule, the above facts appeared; and it appeared, further, from the opinion of a Prussian lawyer, that the Prussian rules of evidence were different from the English, especially that examination and cross-examination by counsel was not permitted.

This Court ordered that, on payment of the costs of the first commission by the defendant, a commission should be directed to a Prussian Judge, as an individual: holding that it ought not to be assumed that the evidence would be taken improperly, and considering that, in the event of such impropriety occurring, an objection might be made at Nisi Prius. Especially as, by this course, an opportunity would be given of raising, by error upon bill of exceptions, the question whether the issuing of such commission was within the power of this Court.

[Obsolete: see *In re Boyse* (1882) 20 Ch. D. 760, 51 L. J. Ch. 660, 46 L. T. 522, and R. S. C., Order XXXVII., r. 6A.]

(1) Repealed, 46 & 47 Vict. c. 49, s. 3.

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ALSTON v. GRANT.

(3 EL. & BL. 128—135 ; S. C. 2 C. L. R. 933 ; 23 L. J. Q. B. 163 ; 18 Jur. 332.)

If the owner of land, on which is a house, construct on the other part of the land a sewer, and let the house, and afterwards, by reason of the original faulty construction of the sewer, and the continued user of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (1).

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THE first count alleged that, before and at the time of the committing of the grievances next mentioned, plaintiff was possessed of a house, with a cellar under the same, and thereto belonging, situate at &c., and in which said house and cellar plaintiff then carried on his trade of a grocer. And, whereas, before the time of the committing of the said grievances, defendants had, for their own accommodation and convenience, made and constructed, and at the time of the committing of the said grievances kept and continued, so made and constructed, a certain sewer or watercourse, in and under a certain street or highway near to the said house and cellar of plaintiff, and which said sewer or watercourse was, at the time of the committing &c., under the management and control of the defendants, and into which said sewer or watercourse defendants, from *time to time, before and at the time of the committing &c., caused and permitted large quantities of water to flow, which said water then flowed and passed in and along the said sewer or watercourse, and near to the said cellar of plaintiff, of all which defendants, before and at the time of the committing &c., had notice : yet defendants, not regarding their duty &c., so negligently, insufficiently and improperly made and constructed the said sewer or watercourse, and, at the time of the committing &c., kept and continued the same so negligently, insufficiently and improperly made and constructed, and in such an insufficient and improper state, and did also, at the said time, so negligently and improperly manage the said sewer or watercourse, and cause and permit such large and unreasonable quantities of water to flow into the same, that, on 5th February, 1851, divers large quantities of water penetrated and burst through, and flowed out of and from, the said sewer or watercourse of defendants into the said cellar of plaintiff, and then greatly damaged and injured the same, and also then damaged and destroyed divers large quantities of groceries and other goods

(1) See *Hargreaves v. Hartopp* [1905] 1 K. B. 472, 74 L. J. K. B. 233, 92 L. T. 414.

of plaintiff then lawfully being in the said cellar, in the way of the plaintiff's said trade.

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There was a second count making a similar complaint as to two houses of plaintiff, laying the damage by the water on 4th February, 1852.

Plea: Not guilty. Issue thereon.

On the trial, before Erle, J., at the Liverpool Summer Assizes, 1853, it appeared that the defendants were owners of two houses occupied by the plaintiff as their tenant; he having taken from them one house in 1845, *and the other in the summer of 1851. About twenty years ago, the defendants, for their own accommodation and convenience, constructed a sewer, which carried off the water from a reservoir belonging to them: and they had since then kept and continued it for their own accommodation and convenience, down to the February of 1852. In February, 1851, the water from this sewer flowed into the cellars of the house so constructed, occupied by the plaintiff; and again, in February 1852, the water flowed into the cellars of both the houses then occupied by him. On each occasion, much damage was done by the water: and, for the plaintiff, it was contended that this was owing to the faulty construction of the sewer. The counsel for the defendants contended that, even supposing this to be so, the plaintiff had no cause of action against the defendants, he having taken the houses from them with all their faults, and it not being suggested that he was ignorant of the state of the sewer. The learned Judge desired the jury to say whether the sewer was constructed with proper care and skill; and they found that it was not. His Lordship then directed a verdict for the plaintiff.

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In Michaelmas Term, 1853, *Knowles* obtained a rule *nisi* for a new trial, on the ground of misdirection.

Hugh Hill and *J. A. Russell* now showed cause:

It may be questioned whether the plea lets in the objection urged for the defendants. But, on the general merits, the defendants are responsible. The plaintiff, though he had but a limited interest derived from the defendants, had, during the continuance of such interest, the same right against them as he would have had if he had *purchased the fee from them. In *Tenant v. Goldwin* (1), where it was decided that the owner of a house may maintain an action against the owner of the adjacent house for

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default of a party wall between the two which the latter is bound to repair, Lord Holt says: "If a man has two houses contiguous, and one has a house of office, which is separated from the cellar of the other by the wall, which keeps in the filth of the house of office, and he sell that house, the vendee must keep in the filth of the house of office, so as it shall not run in upon the other house:" and he adds: "and it would have been all one if the vendor had sold the house with the cellar, then he must have kept the wall of the house of office so as to have kept the filth in; for every man must take care to do his neighbour no damage." There can, as to this, be no difference between letting and selling. The general principle, that no one shall derogate from his own act, applies. The right of an occupier to recover against his neighbour for negligence occasioning damage is illustrated by *Vaughan v. Menlove* (1). In *Cooper v. Barber* (2), LAWRENCE, J., held that, if an owner of land has had immemorially a watercourse whence the water penetrates into his neighbour's soil, doing no visible harm, and the neighbour afterwards builds a house which is injured by the water, an action lies.

Knowles and Holland, contra:

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No time can be pointed out at which the defendants did an unlawful act. They had a right to make the sewer, however faultily, while it injured only their own property: and they were entitled to subject the two houses, before they were let, *to the inconvenience. They incurred no new duty by letting the houses. * * Suppose a man, having a manufactory which would be a nuisance to any one dwelling on his land, but to no one else, lets off a part of the land: can the lessee complain of the nuisance?

(LORD CAMPBELL, Ch. J.: Do you suppose the nuisance to arise from an improper use of the manufactory?)

Suppose it improper, so far as concerns the creation of the nuisance. The lessor of a house is not bound, as between himself and his lessee, to perform all the repairs which he cannot call on the lessee to perform: *Arden v. Pullen* (3): nor, though he must not practice deceit, is he bound to disclose to his lessee the ruinous state of the house, unless indeed he knows that the lessee takes the house in consequence of a belief that it is sound: *Keates v. Earl*

(1) 43 R. R. 711 (3 Bing. N. C. 468).

(2) 12 R. R. 604 (3 Taunt. 99).

(3) 62 R. R. 627 (10 M. & W. 321).

Cadogan (1), *Hart v. Windsor* (2). If the defendants here had bought the house while their sewer existed, the union of the property would have put an end to any right of the purchased house to be protected from the sewer: then, if the house were let again, it would *be let without the right: *Robins v. Barnes* (3). The decision in *Tenant v. Goldwin* (4) is inapplicable: but Lord Holt's *dictum* is relied on. Possibly, in the case of a privy, where the nuisance is augmented by continual new creation of filth, the law may be as there suggested. Mr. Gale, however, appears to consider the *dictum* as questionable, on the principles of English law, and suggests that it was founded on the civil law. The defendants were bound to keep the sewer in as good repair as it was in at the time of the letting: but that duty does not carry with it a liability to make it more sound than it was when first constructed: *Reg. v. Cluworth* (5). If there was no nuisance at first, there cannot, after the letting, be a nuisance by relation: *Rich v. Basterfield* (6).

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LORD CAMPBELL, Ch. J. :

I am of opinion that this rule must be discharged. *Mr. Knowles's* reasoning would have been conclusive except for the fact that the sewer was improperly constructed. Had the sewer been made, before the houses were let to the plaintiff, in the way in which a prudent man would deal with his own property, then, whatever inconveniences followed, the lessee must have submitted to them. But here the sewer was improperly constructed at first: and, when the defendants let the house, a duty was imposed upon them of not allowing that to continue which till then had been rightful. To do so was a derogation from their own act in letting. To keep the sewer in a dangerous state, when it could be remedied, was a wrong, giving a right of action; and the plaintiff purchased the right of *enforcing this. Lord Holt's authority seems to me express. When the houses were in the same hands, no duty could arise: but a duty arose when one house was sold. It cannot be said that, when the houses were in possession of the same person, any new quality was impressed upon either, and that the purchaser of the one was ever after to submit to the nuisance. Lord Holt's illustration, which I take to be good law, applies: and the continuance of a sewer, improperly constructed, is a wrong for which an action lies.

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(1) 84 R. R. 715 (10 C. B. 591).

(4) 2 Ld. Ray. 1089.

(2) 67 R. R. 266 (12 M. & W. 68).

(5) 1 Salk. 359.

(3) Hob. 131 (5th ed.).

(6) 72 R. R. 716 (4 C. B. 783).

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CROMPTON, J. (1) :

I am quite of the same opinion. The action is brought against a neighbour for the way in which he keeps a sewer. It is admitted that he kept and continued it as originally constructed. That is a legal mode of saying that he does more than legally let it alone; he continues the use of it. He is therefore *primâ facie* liable. Then it is suggested that the houses injured once belonged to the defendants, and were let by them to the plaintiff. Had the plaintiff agreed to take the houses with all nuisances, that should have been pleaded: but I do not see how that could be. An analogy seems to be suggested from the law of easements. When a party enjoys two houses, and then grants one away, it is generally implied that he grants all easements necessary for the enjoyment of the house granted. Mr. Gale appears to treat this as a grant created or implied by necessity. But that is not at all like the case where a party keeps in his hands a nuisance: the right to have water flowing into a neighbour's house from an ill constructed sewer is nothing like an easement. The case *therefore is quite different from those which have been decided upon the implication arising from the grant of a dominant tenement. The Judge, therefore, left this case rightly to the jury; for it was agreed that the sewer was kept and continued as it was originally constructed.

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ERLE, J. :

This is an action arising upon the rights of drainage. The plaintiff, though tenant to defendants, had as against them the rights of an ordinary neighbour. It seems to me that a right is cast on one neighbour not to injure another in his ordinary enjoyment. The plaintiff had a cellar filled with goods: his ordinary enjoyment of that included its not being filled with water. The defendants bring water down a sewer: that they might do: but, if ordinary care is not taken, and by reason of such want of care the water gets into the plaintiff's cellar, and does damage, it seems no answer to say that the plaintiff came into the house with the knowledge that the nuisance was going on. If a consent on the part of the plaintiff had been set up, there would have been a question for the jury: but there was no ground for thinking that the plaintiff expected his cellar to be overflowed.

Rule discharged.

(1) Coleridge, J. had left the Court.

TURNEY v. DODWELL.

(3 El. & Bl. 136—142; S. C. 2 C. L. R. 666; 23 L. J. Q. B. 137; 18 Jur. 187; 22 L. T. O. S. 38.)

1854.
Jan. 16.
[136]

Where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill: the promise implied from such delivery not being, within the meaning of the Statute of Frauds Amendment Act, 1828 (9 Geo. IV. c. 14), s. 1, "an acknowledgment or promise by words only," and the word "payment" in the proviso in that section being used in the popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking of it in satisfaction of the debt.

FIRST count on a promissory note, by payee against maker. Second count on a bill of exchange, by drawer against acceptor. Pleas: To first count, the Statute of Limitations. Issue thereon. To the second count, payment into Court; which plaintiff took out of Court.

On the trial, before Jervis, Ch. J., at the last Bedfordshire Summer Assizes, it appeared that the note was more than six years due, but that, within six years, the plaintiff drew the bill, the subject of the second count, and the defendant accepted it on account of part of the debt due upon the note. The learned Judge, in his report of the trial to the Court, stated that, it being admitted "that the bill was given as a part payment of the note," he was of opinion that the plea of the Statute of Limitations was answered, and directed a verdict for the plaintiff, with leave for the defendant to move to enter a verdict for him. It was however agreed, by the counsel on both sides, that the admission at the trial was that the bill was given and taken, in the ordinary way, on account of part of the consideration of the note, and not in absolute satisfaction of so much of it; and that the learned Judge in his report must be taken to have used the word "payment" in that sense.

O'Malley, in last Michaelmas Term, obtained a rule *nisi* according to the leave reserved.

D. Power and *Wroth* now showed cause :

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Anything taken in reduction of the debt is payment: *Hooper v. Stephens* (1), *Hart v. Nash* (2).

(ERLE, J.: There can be no doubt of that, if the bill was taken in payment, in the sense that it was accepted by the creditor as equivalent to so much money. How was the fact?)

(1) 43 R. R. 306 (4 Ad. & El. 71). (2) 41 R. B. 732 (2 Cr. M. & R. 337).

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(The report of the CHIEF JUSTICE was referred to; but it was explained, as before stated, that the bill was taken on account of part of the debt, and not as an absolute satisfaction of it.) The taking of a bill on account of part of the debt takes the case out of the Statute of Limitations. Before Lord Tenterden's Act (9 Geo. IV. c. 14) it clearly would have done so, as being an acknowledgment from which a new contract to pay would be implied: *Tanner v. Smart* (1). Then stat. 9 Geo. IV. c. 14, s. 1, enacted "that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract" for this purpose. But the acknowledgment by giving a bill is not "by words only:" *Cleave v. Jones* (2). The section then contains a proviso "that nothing herein contained shall alter or take away or lessen the effect of any payment" of part of a debt. At all events, when the bill was satisfied by the payment into Court, it became a satisfaction of part of the debt upon the note; and payment of a bill relates back to the time of giving the bill: *Irving v. Veitch* (3). * * *

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O'Malley, in support of the rule :

In all the cases referred to in which the giving of a bill has been held to take a case out of the statute, the bill has been honoured. In such a case it is not disputed that there has been a part payment. It is said that the payment into Court is equivalent to honouring the bill: but a payment or acknowledgment in any shape takes the case out of the statute, because a fresh contract arises; and, supposing that a promise can be implied from payment into Court, it is a promise after action commenced and too late: *Bateman v. Pinder* (4). The real point, therefore, is whether, when a bill is given on account of a debt, and dishonoured, that is payment. If taken absolutely in satisfaction, so that the remedy is on the bill alone, and no longer on the consideration, as is often the case where the bill is the acceptance of a third party, doubtless it may be payment; especially where the creditor has made the bill his own by laches: but in the present case the defendant could not have proved a plea of payment. It seems not within the exception in stat. 9 Geo. IV. c. 14, s. 1: *Gowan v. Forster* (5), *Foster v. Dawber* (6).

Cur. adv. vult.

(1) 30 R. R. 461 (6 B. & C. 603).

(2) 86 R. R. 399 (6 Ex. 573).

(3) 49 R. R. 511 (3 M. & W. 90).

(4) 61 R. R. 319 (3 Q. B. 574).

(5) 3 B. & Ad. 507.

(6) 86 R. R. 506 (6 Ex. 839).

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LORD CAMPBELL, Ch. J., on a subsequent day in this Term (January 27)
delivered judgment :

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The only question in this case was, Whether a part payment by a bill of exchange drawn by the plaintiff and accepted by the defendant was sufficient to take the case out of the Statute of Limitations? The circumstances, under which the acceptance was given, were such as to show that the payment was made as a part payment of the whole amount due, so as to raise the implication of a fresh promise, and therefore to be an answer to the defence of the Statute of Limitations, if the part payment by bill were a part payment within stat. 9 Geo. IV. c. 14. It was said on the part of the defendant, and we think correctly, that we ought to assume that the payment in question was not an absolute payment in satisfaction, so as to be a discharge if the bill were dishonoured. If the payment had been one in absolute satisfaction, no question could have arisen: and we have therefore to consider whether this payment, in the usual manner in which bills of exchange are taken in payment, is a payment within the proviso of stat. 9 Geo. IV. c. 14, s. 1, by which the effect of part payment is preserved. The counsel for the defendant referred us to the case of *Gowan v. Forster* (1), where a doubt was expressed as to whether the drawing of a bill was a sufficient acknowledgment within stat. 9 Geo. IV. *c. 14, and to the case of *Foster v. Dauber* (2), where the Court of Exchequer thought that, under the circumstances, no promise to pay any balance could be implied in the particular case: but there is nothing to show that they thought that a part payment by bill might not be an acknowledgment to take the case out of the Statute of Limitations as to the remainder. On the other hand, in the case of *Irving v. Veitch* (3) the expressions used by the learned Barons lead us to suppose that they thought such part payment by bill sufficient. In both *Gowan v. Forster* (1) and *Irving v. Veitch* (3) it was unnecessary to determine the point now in question, as the Courts, most properly, held that the acknowledgment, if any, was at the time of delivering the bills in part payment, and not at their subsequent payment by the parties on whom the bills in those cases were drawn. At the trial in the present case, the LORD CHIEF JUSTICE of the Common Pleas held that the part payment was sufficient to take the case out of the Statute of Limitations: and we entirely concur in that ruling. Before stat. 9 Geo. IV. c. 14, such a part payment was clearly sufficient

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(1) 3 B. & Ad. 507.

(3) 49 R. R. 511 (3 M. & W. 90).

(2) 86 R. R. 506 (6 Ex. 839).

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to take the case out of the Statute of Limitations, as amounting to an acknowledgment of the balance being due; and the real question is, whether such payment by bill, though not received in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt is laid down by Mr. Justice MAULE in the recent case of *Belshaw v. Bush* (1), approving the doctrine of the CHIEF BARON in *Griffiths v. Owen* (2) and of Baron *ALDERSON in *James v. Williams* (3). In all those authorities such a delivery of a bill is laid down as a conditional payment. We do not see why its immediate operation, as an acknowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statute intending to make a distinction between mere acknowledgments by word of mouth and acknowledgments proved by the act of payment, it surely cannot be material whether such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention, and the act by which it is evinced, remain the same.

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We think that the word "payment" must be taken to be used by the Legislature in a popular sense, and in a sense large enough to include the species of payment in question: and we should think the acknowledgment of liability as to the remainder of the debt not at all altered by the fact of the notes by which it was paid turning out to be forged, or the coin turning out to be counterfeit. In all these cases the force of the acknowledgment is the same; and the payment is, we think, a sufficient payment within the words of stat. 9 Geo. IV. c. 14. In *Maillard v. The Duke of Argyle* (4) the Court of Common Pleas distinctly held that the word "payment," as applicable to a transaction of this kind, even where used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense; and Mr. Justice MAULE in that case says: "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that *means in satisfaction, but when by bill, that does not import satisfaction, unless the bill is ultimately taken up." In *Belshaw v. Bush* (5) the LORD CHIEF JUSTICE of the Common Pleas, in speaking of a transaction of this nature, says: "the real answer is, that, upon this record, you have been paid

(1) 87 R. R. 639 (11 C. B. 205).

(2) 67 R. R. 510 (13 M. & W. 64).

(3) 13 M. & W. 828, 833.

(4) 6 M. & G. 40.

(5) 87 R. R. 639 (11 C. B. 197).

your debt ; " and in the very report now before us the learned LORD CHIEF JUSTICE calls the present transaction a part payment.

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In mercantile transactions nothing is more usual than to stipulate for a payment by bills where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word " payment," and that it is clearly within the class of acknowledgments intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction. The defendant's case, which rested entirely on the proviso in stat. 9 Geo. IV. c. 14, s. 1, being so restricted, therefore fails in its foundation: and we think that, where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill.

The ruling of the LORD CHIEF JUSTICE at the trial being in our opinion perfectly correct, this rule must be discharged.

Rule discharged.

REG. v. HARTLEY.

(3 EL. & BL. 143—144; S. C. 18 Jur. 623.)

1854.
Jan. 16.
[143]

Where a person wrongfully elected to a corporate office has accepted it, so that the office is full, the Court will not, in making a rule absolute by his consent for a *quo warranto*, make it one of the terms that the relator should bear the expenses of the information and disclaimer, though the person in possession of the office does not defend it, and offers to undertake to disclaim if required.

MANISTY, in last Term, obtained a rule *nisi* calling on Hartley to show cause why an information in the nature of *quo warranto* should not be filed against him for the office of councillor of the borough of Wakefield, Yorkshire.

C. Milward, on behalf of the defendant:

The defendant now admits that, through a miscarriage on the part of the presiding officer, the election was void. He therefore does not oppose the rule being made absolute, with costs up to the present time; but, as he is willing to resign or disclaim, the Court will make it one of the terms of the rule that any further proceedings

REG. should be at the cost of the relator. This was done in *Reg. v. Morton* (1).
 HARTLEY.

[*144] (CROMPTON, J.: That case has been departed from in *Reg. v. Sidney* (2), before my brother Erle, in the Bail Court, and in *Reg. v. Earnshaw* (3), in the full Court. The reason is that, the office *being full, there must be a formal information and ouster to set the corporation right: and then the costs of an information and ouster are regulated by statute. We have no power to deprive the relator, who has committed no fault, of the costs which the law gives him.

LORD CAMPBELL, Ch. J.: I should be much inclined to assist the defendant to retire without further expense, as he seems innocent; but we cannot do it.)

Per CURIAM (4):

The rule must be absolute, without any terms.

Rule absolute.

1854.

DANSEY v. RICHARDSON (5).

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(3 EL. & BL. 144—171; S. C. 2 C. L. R. 1442; 23 L. J. Q. B. 217; 18 Jur. 726.)

Declaration, that defendant, being a boarding-house keeper, received plaintiff with her baggage, for reward, as a guest in defendant's house, on the terms, amongst others, that defendant should "take due and reasonable care" of plaintiff's baggage, whilst in the house. Breach: that by negligence of defendant and her servants plaintiff's baggage was lost. Pleas: Not guilty; and a traverse of the receipt on those terms. Issues thereon.

On the trial, it appeared that plaintiff was received, with her baggage, as a guest; but nothing was expressed as to the care to be taken of the

(1) 62 R. R. 305 (4 Q. B. 146).

(2) 90 R. R. 784 (2 L. M. & P. 149).

(3) In this case, *Sir F. Thesiger*, Attorney - General, in Michaelmas Term, 1852, had obtained a rule to show cause why an information in the nature of a *quo warranto* should not be issued against Earnshaw for exercising the office of councillor of the borough of Oldham. *Cowling*, in Hilary Term (January 29), 1853, showed cause, and proposed that the rule should be made absolute, with costs up to the present time, and that defendant should be allowed to disclaim or resign. He mentioned, besides the cases cited in the text, an unreported case of *Reg. v. Appleyard*

(29th January, 1851), and suggested that there was no plenarty. *Sir F. Thesiger*, *contra*, was not called on. Per CURIAM (Lord CAMPBELL, Ch. J., COLERIDGE and WIGHTMAN, JJ.): There can be no resignation, except upon the assumption that the party resigning is in office. Rule absolute, in the ordinary terms.

(4) Lord CAMPBELL, Ch. J., COLERIDGE, ERLE and CROMPTON, JJ.

(5) Discussed in *Holder v. Soulby* (1860) 8 C. B. N. S. 254, 29 L. J. C. P. 246. Judgments of CAMPBELL, Ch. J. and COLERIDGE, J. approved in *Scarborough v. Cosgrove* [1905] 2 K. B. 805, 74 L. J. K. B. 892, 93 L. T. 530.—W. B.

goods. The goods were stolen from the house whilst plaintiff was a guest; and there was evidence that the theft was facilitated by the defendant's servant having left the front door ajar: and there was also some evidence that defendant was aware of habitual negligence of the servant in this respect. The Judge told the jury that a boarding-house keeper was bound to take due and reasonable care about the safe keeping of the guest's goods: which he explained to be such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods: that the leaving the door ajar might be a want of such care; but that the defendant was not answerable for such negligence in the servant, unless she had herself been guilty of some negligence, as in keeping such a servant with knowledge of his habits. Verdict for defendant on Not guilty: for plaintiff on the other plea.

DANEY
v.
RICHARDSON.

On a rule for a new trial:

Held, by the whole COURT, that a boarding-house keeper is not bound to keep a guest's baggage safely, to the same extent as an innkeeper; but that she undertakes, by implication of law although nothing is expressed, to take due and proper care of a guest's baggage; and that neglecting to take due care of the outer door might be a breach of such duty, and that so far the direction was right.

ERLE, J. and WIGHTMAN, J. held that, unless the defendant herself was guilty of negligence, the act of the servant, in leaving the door ajar, was not one for which defendant was responsible; it not being a neglect of any public duty which was owing to plaintiff, and not being a breach of a contract between plaintiff and defendant, but merely negligence of the servant towards his mistress: and that therefore the direction was right.

COLERIDGE, J. and Lord CAMPBELL, Ch. J. held that the act of the servant was, under the circumstances, the act of the defendant; and that there was no distinction between the personal negligence of the defendant, and that of her servant in her employment, the defendant being equally answerable for both: and therefore they held that the direction was wrong.

The Court being equally divided, no new trial was granted.

CASE. Declaration, averring that defendant kept a boarding house in which she was in the habit "of receiving persons, accompanied by their baggage, apparel, goods and chattels, as guests, to be in the said house found and provided by the defendant with the use and occupation of rooms, apartments and furniture of the defendant's, and with meat, drink, servants' attendance and other necessities therein, for certain hire and reward, in that behalf to be therefore paid by such guests to the defendant." Averment: that plaintiff, at the request of "defendant so then keeping the said boarding house, came to and put up at the same, as such guest as aforesaid, and then brought with her unto the same certain personal baggage of her, the plaintiff, to wit" a dressing case. Averment: that plaintiff then became a guest on the terms that defendant was to provide plaintiff with rooms, &c., and "with meat, drink, servants' attendance and other necessities therein as

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aforesaid, and to take due and reasonable care of the said goods of the plaintiff whilst the same were in the said house and whilst the plaintiff was such guest therein as aforesaid, for hire and reward to the defendant in that behalf:” and that it then became the duty of the defendant to observe the terms so set out. Breach: that defendant and her servants so negligently conducted themselves that, through the negligence of defendant and her servants, the dressing case was lost.

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Plea 1. Not guilty. 2. That defendant did not keep such boarding house in manner and form &c. 3. That plaintiff did not become such guest in manner and form &c. 4. That plaintiff and her goods were not received on the terms in the declaration mentioned. On which issues were joined.

On the trial, before Erle, J. at the Middlesex sittings in Hilary Term, 1853, it appeared that defendant kept a boarding house, and plaintiff became a guest of defendant, but that no terms were named as to care being taken of her luggage; that her dressing case was stolen; and there was evidence, to go to the jury, that the thief got at the dressing case by entering through the front door of the house, which defendant's servant had left ajar when going on an errand for plaintiff: and there was also evidence, to go to the jury, that the leaving of the door ajar was habitual negligence on the part of the servant, and that defendant had kept him, knowing that he was so habitually negligent. The details of this evidence will be found more fully stated in the judgment of COLERIDGE, J. The counsel for defendant objected that there was no evidence of the terms, put in issue by the fourth plea. The learned Judge ruled that there was evidence. The case went to the jury: and the learned Judge, in substance, told them that a boarding house keeper had not the unlimited liability of an innkeeper, but was bound to exercise due and reasonable care as to the guest's property, to the same extent which a prudent person would take of her own. The effect of the direction was to leave to them the question whether

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the goods were lost in consequence of the want *of such care on the part of the defendant: and, in explaining this, the learned Judge pointed out to them that the evidence was conflicting on three points: 1st, whether the loss was occasioned by the negligence of the servant in leaving the door ajar; 2nd, supposing there was such negligence, whether the defendant was aware of any thing which made it negligent in her to keep that servant; and, 3rd, whether the plaintiff herself was a party conducing to the loss. He told the

jury that it would not be enough, to fix the defendant, if they thought the servant was so negligent, unless they answered the second question also in the plaintiff's favour; and that then the third question would arise.

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Verdict for defendant upon the issue on the plea of Not guilty; for the plaintiff on the other issues.

Chambers obtained a rule *nisi* for a new trial on the ground of misdirection.

Bramwell showed cause, and *Pearson* was heard in support of the rule. The Court directed a second argument: and *Bramwell* showed cause, *Chambers* being heard in support of the rule. The judgments render any statement of the arguments unnecessary.

Cur. adv. vult.

The Court being divided in opinion, the learned Judges delivered separate judgments.

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ERLE, J. :

The declaration alleges that the plaintiff, with her goods, had been received by the defendant in a boarding house, on the terms, among other things, of taking due and proper care of the goods; and that they were lost by defendant's negligence. The material pleas are: The general issue, and a denial of receiving the goods on the terms alleged.

The facts, as far as they are material to the alleged misdirection, are, that the plaintiff with her goods had been received as a guest in the defendant's boarding house, on terms for board and attendance, in which terms no mention was made of goods; and that a servant, going out on a short errand for her, had left the front door ajar, through which a thief had entered and stolen her goods, namely a dressing case. As to this and other matters, there was conflicting evidence raising several questions of liability against the defendant.

The jury were, in effect, directed, as to the part of the case now to be considered, that the defendant was not bound to take more care of her house and the things in it than a prudent owner would take, and that, if, upon the conflicting evidence, they found that the door was negligently left ajar by the servant, but that this was the only evidence to fix the defendant with negligence, the plaintiff would fail. And I remarked that, if the defendant had taken the

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[149] The plaintiff objected that in this there were two misdirections. First: in stating that the keeper of a boarding house was not liable for a loss by theft if the sole ground of charge was that the negligence of a servant in thus leaving a door open had given a facility for the theft; and, secondly, in observing that, if requisite care had been taken by the defendant to have none but trustworthy servants, one such act of negligence by a servant, as was in question, would not prove want of the care which a prudent owner would take. And he contended: First: that the defendant must be liable for the loss by theft if the servant negligently left the door open: and, secondly: that, whenever a master is liable for the act of a servant, it is contrary to the English law to enquire whether he took care to have none but trustworthy servants.

With respect to the first point, he relied upon the liability of certain bailees for reward; such as wharfingers, agisters and hirers, who have the duty, arising from their contract of bailment, to keep the goods with care, and to deliver them again; and, if they, by their servants, to whom they may delegate their duty of so keeping, are guilty of negligence contrary to their duty, and the goods are lost thereby, they are responsible to the bailor for the loss. Thus, if the servant of the hirer, leaving the stable door open, or of the agister the gate of the field, or of the wharfinger the door of the warehouse, makes the master liable by reason of that negligence, he urged that therefore, by analogy, if the defendant's servant left the house door open, he made his mistress liable by reason of that negligence. Furthermore, he relied on the liability of masters for any act of wrong, causing damage to another, done by the *servant in the course of his employ; such as a collision in driving: and in considering this liability the care of the master in choosing trustworthy servants is immaterial: and the plaintiff urged that the omission of the defendant's servant, by negligence, to shut the door was analogous to the acts of wrong by servants, which, in this class of cases, have made their masters liable for the resulting damage; and that the care of the defendant to have a trustworthy servant was therefore immaterial: and so this was also a misdirection.

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But I am of opinion that there was no misdirection. The observations were made with reference to the conflicting evidence of the

two parties, and were adapted to the different suppositions arising upon that conflict. The main principle was, that the defendant's duty was performed, if she took such care of the house and things in it as a prudent owner would take: this the plaintiff does not dispute. It seems to me to follow, that the direction first complained of is correct; it being an application of this principle. For the door might be left open, in the manner alleged, by a servant without any want of any degree of care on the mistress's part; seeing that the owner of a house cannot always be at the front door; and, when he is absent, the fact may occur notwithstanding every precaution on his part to prevent it. And, with respect to the second observation which is objected to, it was merely explanatory of the direction that there would be no liability for this act of negligence, but there might be liability if the evidence proved other grounds for charging the defendant. Now, if the direction as to non-liability was right, the observation explanatory of it was right; and, if it was not, the misdirection is established without reference to *this observation. I therefore pass it without further notice, and proceed to the substantial question, which is, Whether the keeper of a boarding house be liable to a boarder for the value of any goods stolen from the house, if the negligence of a servant, towards the mistress, such as an omission to shut the door according to her order, has given a facility for theft? Which question I answer in the negative, on the grounds that there is no precedent or principle establishing such a liability; and that there is no analogy between this case and either of the two classes of cases above mentioned.

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First: the absence of any precedent establishing such a liability is strong to show its non-existence; for, if it existed, the occasion for enforcing it must have often occurred. Boarding houses have been numerous: and it is reasonable to suppose that thefts in them have occurred, which were facilitated by the negligence of servants. Also, if the keepers of boarding houses would be liable on the grounds here alleged, so also would the letters of lodgings, the same reasoning applying equally to each; and yet no decision or *dictum* or treatise has been found to sanction the notion of this supposed liability, or to give a principle on which it could rest.

Secondly: there is no analogy between the present case and either of the two classes of cases relied on for the plaintiff. In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods if they are stolen through the

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negligence of their servants, the goods are delivered to, and are in the possession of, the bailee, who, by the contract of bailment for reward, undertakes a private duty to the bailor to keep them with care, and to deliver them again; and this private duty is the test to ascertain whether any *alleged state of facts amounts to actionable negligence; for the question, whether given facts amount to actionable negligence, depends upon the legal duty owed to the party who affirms the negligence to be a breach of the duty owing to him by the opposite party. But, in the present case, there is no delivery of the goods of the plaintiff to the defendant; there is no contract by the defendant to keep them with care and deliver them again; there is no reward in respect of goods, the terms being the same for a boarder whether with or without goods; there is no duty of keeping owing from defendant to plaintiff, and, consequently, no measure by which to try whether any given act, such as leaving a door open, is actionable negligence contrary to that duty. The goods of the plaintiff in this case remained in her possession and under her controul, and were disposed of by her as she chose, without notifying what she had done to the defendant. The bailee for reward has possession, and can apply care to guard, and undertakes to do so: the defendant had no possession and could apply no care to goods which she knew not of. The decisions that a bailee by deposit is not liable for a theft by his own servants unless there was negligence of himself, are in favour of the defendant; for she had not the same duty to keep with care as a depositary has, not having had the possession. In *Foster v. The Essex Bank* (1), and *Finucane v. Small* (2), it appears that the servants of the depositary stole the deposit, and the masters were held not liable. Now, if a depositary is *not liable for an actual theft by his servant, it seems to me that he ought not to be liable for a theft facilitated by the negligence of his servants. In the other class of cases, relied upon by the plaintiff, where the master is held liable for the act of the servant, the servant has, in the course of his employ, caused damage by a misfeasance, in violating some public or private right of the complainant. The usual example of this species of liability is in cases of collisions on highways, there being a public right to the safe use of highways, and a correlative duty not to obstruct that use; and the master who, by himself or his servant, makes a wrongful collision, violates the public right,

(1) 17 Massachusetts Reports, 479.

(2) 1 Esp. N. P. C. 315.

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and is liable for the consequent damages; and, though this doctrine has been said to apply when the servant is guilty of an omission only, and the damage arises from an act of a stranger, as where the cart was left by the servant, and a stranger struck the horse, which backed into the plaintiff's window: *Illidge v. Goodwin* (1): still the true ground of the decision, as expressed by the Judge there, is that it is a misfeasance to place a horse and cart without attendance in a public street; and the damage was sufficiently connected with that misfeasance. Here, the defendant by her servant had been guilty of no misfeasance; the omission to shut the front door violated no public right of the plaintiff, and was in no sense an injury to her. Thus the supposed analogy between the present case and the cases of misfeasance by servants fails, from the difference of the acts complained of. It fails also in respect of the remoteness of the damage. In cases of collision the damage is immediate from the injury; but, in the present case, the thing complained of is the *open door, which, by itself, was harmless; and the damage arose from the wilful trespass of a third person who entered and stole; and therefore the supposed analogy, between a mere omission to close a door and direct damage to person or property from wrongful collision, fails doubly.

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The unlimited extent of the liability for unknown goods, and the impossibility to guard against all negligence in every servant, and the unreasonableness of charging a party for the loss of goods which he never was intrusted to keep, are strong against now imposing, for the first time, such an uncompensated risk on the keepers of lodging houses: and I know of no reason for imposing of it.

I therefore think that the plaintiff's rule for a new trial should be discharged.

WIGHTMAN, J.:

This was an action against the defendant, who kept a boarding house, for the loss of a box belonging to a guest, through the negligence and want of reasonable care on the part of the defendant and her servants. The declaration alleged that the plaintiff became a guest in the boarding house of the defendant, on the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff, whilst they were in the house of the defendant, for hire and reward to the defendant

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in that behalf; and that it then became the duty of the defendant, as such boarding house keeper, by herself and her servants, to take such due and reasonable care of the goods of the plaintiff whilst she remained as a guest with the goods in the defendant's house. No special terms were proved upon the trial; and it did not appear *that there were any beyond such as would be implied by law from the relation of boarding house keeper and guest, who was to pay for her board and lodging.

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The declaration alleges that one of the terms was "to take due and reasonable care of the said goods of the plaintiff:" and the first question is, what degree of care, if any, is required by law of a boarding house keeper in respect of the property of a guest, which is no further in the care or charge of the boarding house keeper, either actual or by legal implication, than by being in the house. In the case of an innkeeper, the property of the guest is, by legal implication, in the actual care and custody of the innkeeper, who, by custom, is responsible for their safety at all events, with some rare exceptions. In the case of a bailee of goods to whom they are actually delivered, and who has the care and custody of them, as in the case of an agister of cattle, or the borrower of a horse, a certain degree of care is required in the keeping the property which they have in their possession: and, in some cases of bailment, the bailee is only bound to take as much care of the goods in his actual custody and possession as if they were his own. I can find no authority for holding that a boarding house keeper is a bailee of the goods of his guest at all, or that he is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take with respect to his own. If he is bound to no more care than that, my brother ERLE's direction seems to me to be perfectly right and well warranted by the evidence in the case. The utmost care of a prudent owner might fail from the unforeseen negligence or dishonesty of a servant, against which it *might be impossible for him to guard. If he is guilty of negligence in the selection of his servants, or in keeping such as he may well distrust, he can hardly be considered as taking the care of a prudent owner, and on that ground might be liable for a loss occasioned by the servant's negligence.

It has been suggested that the defendant would have been liable, in case she had herself negligently left the door open, and the property of the plaintiff had been lost by such negligence: and

that, if she would have been liable in case of her own negligence, she would be also liable for a loss occasioned by a similar negligence of her servants. I do not by any means agree to this. A prudent owner would not himself leave the street door open and expose his property needlessly to depredation; but the most careful owner cannot be secure against the negligence of his servants; all that he can do is to endeavour to secure such as are careful. I may add that this appears to be the first attempt to fix such a liability upon the keeper of a boarding house: at least no instance of such an action as the present was cited, founded, not upon any special terms agreed upon, but upon the mere relation of boarding house keeper and guest.

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Upon the whole, it appears to me that there is no sufficient ground for the plaintiff to complain of the direction given to the jury by the learned Judge, and that the rule should be discharged.

COLERIDGE, J. :

The declaration in this case, which has been already fully stated, alleges, by way of inducement, that one of the terms, on which the plaintiff became a guest in the boarding house of the defendant, *was that defendant would take due and reasonable care of the goods of the plaintiff, whilst they were in the house of the defendant, for hire and reward to the defendant in that behalf, and that it then became the duty of the defendant, as such boarding house keeper, by herself and her servants, to take such due and reasonable care of the goods of the plaintiff whilst she remained as a guest with the goods in the defendant's house: a breach of this duty is then assigned, and a loss of some of the plaintiff's goods by the neglect of the defendant and her servants to take such due and reasonable care. The pleas raise issues both upon the duty and the breach.

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It appeared in evidence that the defendant was the keeper of a boarding house, and that the plaintiff had been for some weeks her guest in it, paying between 2*l.* and 3*l.* per week. She had the use of sitting, drawing and dining rooms, in common with others, her own bedroom, her board, and the attendance of the servants, among whom were a butler and page; and these, when required, went on errands for the guests, and carried their luggage to and from their rooms, when they arrived and departed.

On the 10th December in the evening, the plaintiff was to leave the house and to dine before she went. About half past five, being

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in her bedroom, she was told dinner was ready, by one of the men servants, to whom she gave part of her luggage to take down stairs; and the other servant afterwards carried down the remainder: all were placed in the hall near the fore door. Shortly before her departure, she sent the butler out to a shop near for biscuits; and it was not seriously contested by the defendant's witnesses that this servant, going out, left the fore door ajar, and a thief, profiting
[*158] *by the opportunity, entered and carried off a box of the plaintiff's, containing valuable property. There was no evidence whether the defendant had received a character for carefulness with the butler when he entered her service. There was conflicting evidence whether he had on former occasions left the door ajar, and, if so, whether that was within the knowledge of the defendant; and also whether any former robberies attributable to the same cause had occurred.

Upon this evidence, it has been contended that the plaintiff should have been nonsuited, on the ground that there was no duty on the defendant to take such care of the plaintiff's goods as alleged in the declaration; but, unless it can be established that the defendant was not bound to take any care, it must be admitted she was bound to take due and reasonable care. It seems to me perfectly clear she was bound to take some care; and that my brother ERLE was quite right in refusing to nonsuit.

The more important and more contested question remains: what was the extent of care which was due and reasonable under the circumstances, and whether the defendant has failed in the discharge of that which was incumbent on her. If we were to consider the cases of innkeeper and boarding house keeper on principle merely, it would seem that the latter would be required to take at least as much care of the goods of a guest as the former. Whether I am staying at an inn, or a boarding house, there is ordinarily neither more nor less of an express bailment of my goods to the master of the house: in both cases the custody of the goods, such as it is, is incident to myself being there as guest; and
[*159] this is in consideration of valuable reward: *while in the case of the innkeeper there is, in the absence of any lawful excuse, a necessity to receive me, which does not exist in regard to the boarding house keeper. My being received into the house at all is owing to a purely voluntary contract, of which the reception of my goods is a necessary part (for it would be simply absurd to suppose my lodging in a house, and not bringing with me my clothes and

articles of personal use); and a pecuniary reward is the consideration. The liability of the innkeeper, as indeed other incidents to his position, do not however stand on mere reason, but on custom, growing out of a state of society no longer existing; and I agree that it cannot be extended in all respects to the boarding house keeper. But the liability of this last must be measured by what is reasonable: he receives, for hire and reward, into his house a guest with clothes and personal chattels; he finds him servants to attend on him, or he attends on him himself; he supplies him with food, prepared by himself or his servants; and he reserves to himself the general controul of the house, and undertakes, in a general way, for its security from without. I do not know that, in measuring the liability resulting from these circumstances, it is necessary to reduce it under any one of the five heads enumerated by Lord Holt in *Coggs v. Bernard* (1); there may be no express or independent bailment reducible under any one of them: and yet there may be a liability where they sustain damage or are lost by the misconduct or negligence of the boarding house keeper. It seems therefore the right course, with a view to the present case, to enquire for what neglects a boarding house *keeper will be liable if they are personally his own, and then to see what difference, if any, it will make if they are his servants'.

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Now, if the defendant here had neglected to give the plaintiff a dry bed, or wholesome food, and the plaintiff had become sick in consequence, if the defendant had by negligence lost the boots or shoes, or any articles of the plaintiff's dress, which, in the course of attendance on her, she had taken to clean, it cannot be doubted that she would have been liable to make recompense in damages. The defendant then, it must be admitted, was bound in her own person to exhibit ordinary care towards the plaintiff and her goods; for ordinary care would presumably have prevented any of these things happening. If now the jury, who decided the present case, had had to consider the character of what occurred in the defendant's house, supposing the defendant had been without servants, or had in the particular instance attended on the plaintiff herself, would they have thought that ordinary care had been exhibited? On this supposition the facts would have stood thus: the defendant, having placed the plaintiff's goods near to the fore door in the hall, goes out on a winter's evening, between five and six, when the light is gone, and leaves the fore door ajar in a street in London,

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But it will be said that, in fact, here the negligence was the act of the servant. And therefore we are to see next what difference that makes in the case. Waiving for a moment the question of liability, I think it must be admitted that the quality of the act itself will not be altered by a change of the agent: if it would have been negligence in the mistress, it will not be less negligence in the servant; if it would have been no answer, in the case of the former, that she had always before and in all other respects been very careful, and that this was a single instance, so in respect of the servant, and as against him, the same excuse would not have availed. The mistress might have deserved the character generally of a prudent housekeeper, and the servant of a careful domestic; yet, if, in the particular instance, either had been negligent, and thereby injured the plaintiff, each must have answered in damages. This rule must prevail wherever on the maxim of *respondet superior* the master is answerable for the servant, whether in the way of commission or omission. In no such case can the master excuse himself by showing the care he had taken in the selection of this servant, or that servant's previous good character and conduct. If A.'s coachman, being in one instance careless or drunk, in driving his master's carriage in his service runs over B., and B. sustains an injury, A. cannot excuse himself from answering for it because he had taken all imaginable care in selecting him for his servant, or because he had had the best of characters with him from his last employer, or because such misconduct in a long course of years had never happened before. And this is so, *because he is to answer for the act as if it were his own; and, if it were his own act, excuses of this kind would be unavailing.

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My brother ERLE, at the trial, considered the present case not to fall within this rule. He separated the servant's alleged negligence from the defendant's, and so directed the jury, in such terms, that, unless they thought both concurred (that is, unless the servant

were negligent in the act which he did, and the defendant also negligent in keeping the servant), the jury would understand that they ought to find their verdict for the defendant.

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After much consideration, I cannot agree to this. It seems to me a novelty in the law, without foundation in any satisfactory principle, complicating the inquiry for the jury very inconveniently, and likely to lead them to unjust conclusions. It will be observed that I have not attempted to lay down any precise definition of the amount or kind of care which the defendant was bound to have taken of the plaintiff's goods : but let the rule be that she was only bound to take such as a prudent householder would take of his own (and less than this it can scarcely be), yet, if you understand and apply that rule in the sense in which my brother **EARL** applied it, it is obvious that it is consistent with the grossest negligence, even misfeasance, on the part of the servant ; for a mistress, who uses all ordinary care in the hiring and overlooking of her domestics, may yet have careless or wilful servants, or drunken ones, or she may unfortunately have a servant who is commonly sober, and yet who, upon one occasion, being intoxicated, may occasion great loss or injury to the goods of the guest in the house ; and this may happen in the performance of services for the mistress in her place, and for which the *mistress is paid, and yet the mistress will not be answerable. If the rule, so understood, be applicable to the case of negligence or omission, I cannot see, in reason, why it is not equally applicable to misfeasance and commission. The same care may have been taken in the selection of servants guilty of the latter in the grossest degree, as of the former ; and if that care be used the master will have done all that, according to the rule, is required of him. But it seems to me, the same answer applies in both ; the guest is entitled to the due and reasonable care absolutely ; he comes to the house, and pays his money for certain things to be rendered in return, among others the care I speak of ; to him it is indifferent whether the master renders them in person or by a servant ; it is the master who engages for them ; the guest does not stipulate for wholesome food, if the master has a good and careful cook ; or a dry bed or clean room, if the housemaid be cleanly and careful ; or punctual obedience to his orders, if the domestics are civil and careful. He stipulates for all this directly from the master, having no controul himself over the servants, and having nothing to do with the master's judiciousness, or care, or good fortune, in selecting them. And the duty of the master must

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DANSEY be measured by the same rule; he undertakes to the guest, not
 *
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 supply him with certain things, and to take due and reasonable
 care of his goods.

When indeed we speak of taking the same care of the guest's
 goods as a prudent owner would take care of his own, we do not
 speak of a habit or character generally; but we apply it to the
 particular instance upon which the question arises in judgment.
 [*164] Occasional carelessness *of conduct is consistent with general care-
 fulness of character, though it is not commonly found with it.
 A man, therefore, may be a prudent owner, and yet not in every
 instance take good care of his own property. The only practical
 question therefore turns upon the quality of the individual act
 Has such care been shown in the particular instance, as the party
 injured had a right to insist on? If it has not, he must be answer-
 able who, expressly or impliedly, has undertaken for a sufficient
 consideration to show it. It may be said that this may sometimes
 lead to hard consequences; and, no doubt, the liability of masters
 for the acts or omission of their servants weighs heavily on them;
 but the hardship would be at least equal if the master were not
 liable; and it would be attended with injustice too. If the master
 be morally innocent, so must the injured party be also; for he
 cannot recover, if by his own misconduct or negligence he has con-
 tributed to the loss: and, of two innocent persons, surely he should
 suffer through whom it is, by the employment of another, the mis-
 chief has been occasioned.

I think therefore that the case should go down to a new trial.

LORD CAMPBELL, Ch. J.:

After having considered this case very deliberately, I come to the
 conclusion that the rule for a new trial ought to be made absolute.

I think that the application for a nonsuit was properly refused,
 and that the defendant was not entitled to a verdict on the fourth
 plea, denying that the plaintiff was received into the boarding
 house, with her goods, on the terms mentioned in the declaration.
 The declaration neither alleges a bailment into the personal custody
 [*165] of *the defendant, nor charges an absolute duty to keep safely.
 The defendant did receive the plaintiff with her goods, on the terms of
 providing her with rooms, furniture, meat, drink, servants' attend-
 ance and other necessities, and of taking due and reasonable care
 of her goods while they were in the said house and plaintiff remained

such guest therein ; *i.e.* such due and reasonable care as a boarding house keeper ought to take of the goods of a guest. This by no means amounted to the care which an innkeeper is bound to take of the goods of a guest, or the care required of a bailee with whom goods are deposited to be safely kept and returned to the owner ; although the duty, whatever the extent of it might be, was not undertaken gratuitously. The evidence adduced by the defendant was very strong to rebut the case of negligence made by the plaintiff, and even to show negligence on the part of the plaintiff as conducive to the loss ; but I cannot bring myself to think that the three questions were properly left to the jury : 1st, " Whether the loss happened from the negligence of the servant in leaving the door open ? " 2ndly, " If it did, Whether there was any negligence in the defendant in hiring or keeping such a servant ? " and, 3rdly, " Whether there was negligence on the part of the plaintiff which conduced to the loss ? " If the jury should think that there was no negligence in the servant in respect to leaving the door open, they were to find for the defendant. And this was quite proper. But, although there should be negligence in the servant in leaving the door open, however gross it might be, still the jury were to find for the defendant unless there was negligence in the defendant in hiring and keeping such a servant. The third question was to arise only if the two first were answered favourably for the plaintiff.

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Now, if the loss arose from gross negligence in the servant, I cannot say that the defendant might not be liable, although she was not guilty of any negligence in hiring or keeping the servant. Low as the duty of a boarding house keeper may be, with respect to the care of the goods of a guest, compared to that of an innkeeper, I cannot go so far as to say that in no case can he be liable for loss of goods by the negligence of a servant, although he was not guilty of any negligence in hiring or keeping the servant. I by no means say that, if the loss of the plaintiff's dressing case arose from the servant having by mistake left the door ajar when he intended to shut it, the defendant must be liable for the loss ; but I think there may be negligence in a servant in leaving the outer door of a boarding house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guests. If he employs servants to perform this duty, while they

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are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass, committed by them: but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do: and I am not aware how the keeper of a lodging house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper; but, within the scope of that which he ought to do, I apprehend that he is equally liable whether he is to do it by himself or his servants.

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The doctrine that inquiry is to be made whether the master was guilty of negligence in hiring or keeping the servants is, I believe, quite new. The *scienter*, as to the character and habits of the servants, may become material where an attempt is made to throw upon him a liability for a loss by their felony or wilful trespass, to which *primâ facie* he is not subject. With respect to *commodatum* or "lending gratis," it is expressly laid down by Lord Holt, in *Coggs v. Bernard* (1), that the bailee is liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. Putting the case of a horse borrowed, he says: "If the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse." Here extraordinary care is required, and the bailee is liable for slight negligence. But Story makes the bailee liable for the negligence of his servant in the case of the hirer of a horse, who is only bound to take the same care of the animal that a prudent man would of his own. "The hirer is not only liable for his own personal default and negligence, but for the default and negligence of his servants, and domestics, about the thing hired. If, therefore, a hired horse is ridden by the servant of the hirer so immoderately, that he is injured or killed thereby, the hirer is personally responsible. So, if the servant of the hirer carelessly and improperly leaves open the stable door of the hirer, and the horse is stolen by thieves, the hirer is responsible therefor:" Story on **Bailments*, chap. vi. sect. 400, p. 265 (2). The same distinguished jurist proceeds to show that in cases where only ordinary care is required in the bailee he

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(1) 2 Ld. Ray. 916.

(2) 1st ed.; p. 404, 5th ed.

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is not liable for thefts by his servants, unless there be circumstances which impute to him personally a want of due diligence. "Thus, where a trunk was deposited with an upholsterer for a reward, the contents of which were stolen by his servants, notwithstanding reasonable care in the custody of it by him, he was held not responsible for the loss." But, "if a watch is deposited with a watchmaker for repairs, and it is left in his shop in a less secure repository than that in which he keeps his own, and it is stolen by his servants, he will be responsible for the loss. So, if an agister of cattle for a reward leaves open the gates of his field, or allows the fences to be defective, so that the cattle escape, he is liable for the loss:" Story on Bailments, chap. vi. sect. 407, p. 269 (1). I conceive that, in all the various sorts of bailment, when a question arises as to the liability of the bailee for the loss of the thing bailed, it is to be determined by the degree of care required from the bailee, and the degree of negligence from which the loss arose; and that the question is not whether the negligence is imputed, personally to the bailee, or to his servants within the scope of their employment. In the present case, if Mrs. Richardson, herself, had gone out and left the door ajar, so that a thief had entered and stolen the plaintiff's goods deposited in the hall, it would not necessarily follow that she would have been liable for the loss. The jury would have had to say whether, under all the circumstances, this was a want of the ordinary care to be expected from a prudent housekeeper. At some hours of the day, and in certain situations, *the outer door of a house may be left entirely open, without any negligence. Story, in treating of the extraordinary responsibility of an innkeeper, intimates an opinion that, where it is the usual custom to turn a horse out to pasture in the night, the innkeeper would not be liable for the loss of a horse so turned out and stolen; and he adds: "In the country towns in America, it is very common to leave chaises and carriages under open sheds all night at inns; and also to leave the stable doors open or unlocked. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration, how far the innkeeper would be liable:" Story on Bailments, chap. vi. sect. 478, p. 312 (2).

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The questions to be left to the jury in the present case, I think, were: Whether the door was left open, and whether there was a want of ordinary care and diligence in so leaving it open, whereby the property was lost. The distinction taken, between the negligence

(1) 1st ed. ; p. 414, 5th ed.

(2) 1st ed. ; p. 507, 5th ed.

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of the servant in leaving the door open and the negligence of the defendant in hiring or keeping the servant, it seems to me cannot be supported. Wherever a loss of the thing bailed arises from a want of the degree of care which, from the nature of the bailment, ought to be exercised, I think it immaterial whether the negligence be imputable personally to the bailee, or to servants employed by him.

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It was very truly observed, at the Bar, that this was not the common case of *depositum*, and that the duty of the defendant was not that of a bailee to whom a chattel is personally delivered to be safely kept and returned, for reward. But there was a duty incumbent upon the defendant, as keeper of the boarding house, with respect to the plaintiff's goods when they were lawfully deposited *in the hall, and even while they remained in the room appropriated to the plaintiff; and I think it was a breach of that duty if, through the gross negligence of the defendant, or her servant, the outer door was left open at a time when thieves might be expected to enter the house, and by means thereof the goods were stolen. The luggage of a passenger by railway, though never delivered to any servant of the Company, and remaining in the personal keeping of the passenger during the journey, is nevertheless, in point of law, in the custody of the Company so as to render them liable for its loss by the negligence of their servants; see *Great Northern Railway Company v. Shepherd* (1).

But, in the present case, the jury were told to find for the defendant although the loss arose from the negligence of the servant, although there was no negligence on the part of the plaintiff, if the defendant was not guilty of negligence in hiring or keeping the servant. This amounts to the doctrine that the boarding house keeper cannot be liable for negligence of the servant, however gross, which causes the loss of the goods of the guest, if the master cannot be justly accused of negligence in hiring and employing that servant. To this doctrine I cannot accede. I by no means suppose that a boarding house keeper is liable for the loss of the goods of the guest by theft, where there has been no negligence. Robbery is *vis major*, which according to the better opinion would excuse even an innkeeper, although not a common carrier. But the loss, here, is alleged to have arisen from the gross negligence of the servant, for which I think the boarding house keeper may be liable, without proof of previous knowledge of any deficiency or evil habits in the servant.

(1) 91 R. R. 370 (8 Ex. 30).

In the argument, it was contended that the defendant could not be liable for this negligence of the servant, as it resolved itself into mere nonfeasance. But, without determining whether the imperfect shutting of the door is to be called nonfeasance or misfeasance, I think the doctrine cannot be supported that, where there is a duty to be performed which is left to a servant, the master is not liable for the omission or nonfeasance of the servant. We have already seen the liability of the master where from the omission to shut a stable door a steed is stolen; and many other instances might be given where the omission of a servant to do acts, in pursuance of a duty for protecting the public against damage, would render the master liable for the consequences. Here the duty was that the outer door of the house should be properly attended to; not that it should be kept constantly shut; and the simple fact of its being left for a time ajar or wide open would be no conclusive evidence of negligence for which the defendant is liable. But the outer door might be left open under circumstances which might make it amount to gross negligence: and, if this was the act of the servant, I cannot say that, to render the boarding house keeper liable, it is necessary to prove that he knowingly kept a negligent servant. The only duty in this case arose out of the relation of boarding house keeper and guest; but I think there might have been a breach of that duty under the circumstances alleged and proved, without proof of personal misconduct on the part of the defendant.

I therefore concur with my brother COLERIDGE in thinking that the rule for a new trial should be made absolute. But, as my brother WIGHTMAN and my brother ERLE are of a contrary opinion, the rule will not be made absolute.

The COURT being equally divided, the rule dropped.

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(3 El. & Bl. 172—180; S. C. 23 L. J. M. C. 106; 18 Jur. 745.)

An order of Sessions, dismissing an appeal against a poor rate, and ordering costs to be paid by the appellant to the respondent, is valid and may be enforced by removing it into this Court, and issuing execution thereon under stat. 12 & 13 Vict. c. 45, s. 18; for that Act does not take away the jurisdiction given by stat. 17 Geo. II. c. 38, s. 4, to order costs

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on an appeal from a poor rate, but gives an additional remedy for enforcing such an order.

Semble, that in cases in which jurisdiction to order costs on appeal is given only by stat. 12 & 13 Vict. c. 45, s. 5, the order may be enforced under sect. 18, if the order be in other respects valid.

MELLOR, in last Michaelmas Term, obtained a rule calling on the prosecutors in this case to show cause why the order of the Quarter Sessions for the Parts of Lindsey, made upon the appeal of John Thomas Huntley, clerk, against an assessment for the relief of the poor of the parish of Binbrooke, the rule of this Court made to remove the said order of Sessions into this Court, and the writ of *fi. fa.* and subsequent proceedings thereon, should not be set aside, and why the moneys levied thereunder should not be returned to the said defendant. The rule was drawn up on reading (amongst other things) the order of Sessions above mentioned; which, after reciting the reference of the appeal to a barrister, and the making of his award, proceeded: "Now at this Court, the respondents brought into Court the award of the said arbitrator; and the said award was, on motion by the said respondents, entered as the judgment of the Quarter Sessions in the said appeal, and is in the words and figures following; that is to say: 'Whereas,'" &c.: the order then set out the award *verbatim*; which, after reciting the reference, proceeded: "I do make and publish this my award in writing of and concerning the premises; that is to say: I award and order that the said appeal be, and the same is hereby, dismissed; and that the said assessment be confirmed; and the same is hereby confirmed accordingly. And I award and order that the said appellant shall pay his own costs of the said appeal and of this reference and the costs of this my award; and that he shall, within one month after this my award shall have been entered as the judgment of the said Court of Quarter Sessions in the said appeal, pay to the said respondents their costs of the said appeal and of this reference. And I adjudge and ascertain" &c.: the award then ascertained specifically the different costs (1). This order of Sessions was, by a rule of this Court, removed into this Court in Trinity Term last, and a *fi. fa.* issued, under which the costs were levied. The present rule was obtained on the ground that, by stat. 11 & 12 Vict. c. 43, s. 27, the order ought to have been to pay the costs to the clerk of the peace, not, as it was, to pay them to the respondents.

(1) See *Re Huntley*, 93 B. R. 392 (1 El. & Bl. 787).

Macaulay, Hayes and Manisty, in last Michaelmas Term, showed cause (1) :

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The rule seems to have been moved for under the supposition that the order for costs was made under stat. 11 & 12 Vict. c. 43 : but that is a mistake. That Act is confined to appeals against summary convictions and orders, whereas the present is an appeal against a poor rate. The order for costs is under stat. 17 Geo. II. c. 38 ; and the subsequent proceedings now sought to be set aside are under stat. 12 & 13 Vict. c. 45. But the latter statute, in sect. 5, *rather inconveniently, refers to stat. 11 & 12 Vict. c. 43, so as to incorporate part of it ; and thus the question comes to be, what is the intention of the Legislature, to be collected from the different parts of the different statutes.

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By stat. 17 Geo. II. c. 38, s. 4, the justices, on appeal against a poor rate, may award costs in the same manner that they are empowered to do in cases of appeal touching settlement by stat. 8 & 9 Will. III. c. 30, s. 3. Under these enactments, if unaltered, there would be no question but that this form of order was right ; but the remedy for non-payment would be confined to distress (given by the last-mentioned Act), or, it may be, to indictment. But by stat. 12 & 13 Vict. c. 45, s. 18, it is enacted that “ in all cases where any order shall be made by any Court of General or Quarter Sessions of the peace it shall be lawful for the Court of Queen’s Bench,” or a Judge of that Court, upon proof of refusal or neglect to obey such order, “ to order and direct such order of the Court of General or Quarter Sessions to be removed into the said Court of Queen’s Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner, as a rule made by the said Court of Queen’s Bench.” If this stood alone, there seems no doubt that the legal construction would be that all orders which could be made before remained good, and that all remedies for enforcing them remained as before, though the Legislature gave a cumulative remedy applicable to all such cases : but no powers would have been given to make orders where they could not be made before. But sect. 5 enacts that, “ upon any appeal to any Court of General or Quarter Sessions of the peace,” the Court may, if it think fit, order “ the party ” against whom the appeal * is decided “ to pay to the other party ” costs, “ such costs

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(1) November 24th ; before Lord Campbell, Ch. J., Coleridge, Wightman, and Erle, JJ.

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upon an appeal against an order or conviction" by stat. 11 & 12 Vict. c. 43. This section gives another cumulative power; the Sessions may make an order under this statute with the same remedies as those given by stat. 11 & 12 Vict. c. 43, s. 27, that is, by distress or imprisonment; but the powers to make orders already vested in the Sessions by any previous Act are not abrogated. Affirmative words in an Act giving an additional right or remedy do not take away rights or remedies already vested either by previous Acts or at common law. Of this there are many instances; *Reg. v. Robinson* (1) may be mentioned. The order made under stat. 17 Geo. II. c. 38, s. 4, is not the less an order of Sessions within the intention of the Legislature, expressed in stat. 12 & 13 Vict. c. 45, s. 18, because another order might have been made under sect. 5 of this last Act, even on the supposition that an order made under sect. 5 would not be enforceable in this way. In *Reg. v. Binney* (2), where the order for costs was on an appeal against an improvement rate made under a local Act, which gave to the party costs on appeal in general terms, CROMPTON, J. intimated that in his opinion the order directing the costs to be paid to the party was strictly proper, an opinion which he still retained and acted upon at chambers, on an application made before him in the present case. But, supposing that this order were made under stat. 12 & 13 Vict. c. 45, s. 5, still it would be good, and enforceable under sect. 18. The objection seems to be this. Stat. 11 & 12 Vict. c. 43, which is confined to appeals from summary convictions and orders, by sect. 27 enacts that, "if upon any such *appeal the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such Court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay such costs shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace, or his deputy," shall grant a certificate to that effect; and on production of the certificate any justice may direct the costs to be levied by distress, or in default of distress may commit for not more than three months. Now it seems to be said that, inasmuch as stat. 12 & 13 Vict. c. 45, s. 5, contains the words "such costs to be recoverable in the manner provided for the recovery of costs upon

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(1) 2 Burr. 799, 803.

(2) 93 R. R. 409 (1 El. & Bl. 810).

an appeal against an order or conviction," under stat. 11 & 12 Vict. c. 43, therefore the remedy by distress and imprisonment is the only one for enforcing the present order. But sect. 18 of stat. 12 & 13 Vict. c. 45, which is in terms made applicable to all cases of orders by Sessions, superadds the remedy by removal into the Queen's Bench. * * *

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Mellor and Joseph Addison, in support of the rule :

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The object of the Legislature in stat. 12 & 13 Vict. c. 45, was, as appears by the recital, " that the law should be more uniform." It would be by no means consistent with this object if there were to be different forms for orders for costs on appeal in different classes of cases, though there is a curious change of language. By sect. 4, an appellant on frivolous grounds is " liable if the Court " of Sessions " shall so think fit, to pay " the costs of the respondent, " such costs to be recoverable in the manner hereinafter directed : " in sect. 5, as already pointed out, the language is that the Court " may order the party to pay to the other party " costs, to be recoverable in the manner provided in stat. 11 & 12 Vict. c. 43 : by sect. 6, if an appeal is not prosecuted, the Court of Sessions " may, if it so think fit, " " order to the party receiving " notice of appeal costs " to be paid by the party or parties giving such notice, such costs to be recoverable in the manner last aforesaid." It does not appear why the language is changed ; for the three sections evidently mean the same thing : but it cannot be supposed that the Legislature intended that there should be three different forms of order in the three cases, nor that the form of the order for costs under stat. 11 & 12 Vict. c. 43, should be different from that in the *other cases. The true construction seems to be that all three sections, 4, 5 and 6, of stat. 12 & 13 Vict. c. 45, incorporate the whole of stat. 11 & 12 Vict. c. 43. This gives no more force to the words " in the manner provided " than was given to similar words in *Richardson v. The South Eastern Railway Company* (1). * * And the peculiar remedies given by sect. 18 of stat. 12 & 13 Vict. c. 45, do not extend to orders for costs under sects. 4, 5, or 6. It would be incongruous, when the remedy given in sect. 5 is distress, and, in fault of distress, imprisonment for not more than three months, if, in the same statute, by sect. 18, a remedy was given which would enable the party to take the other in execution at once, absolutely.

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Cur. adv. vult.

(1) 87 R. R. 612 (11 C. B. 154).

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LORD CAMPBELL, Ch. J., in this Term (January 30), delivered the judgment of the COURT :

This was a rule for quashing an order of Sessions, and the *certiorari* by which it was removed into this Court for the purpose of execution, on the ground that the order was void by reason of its ordering the costs of the appeal to be paid by the appellant to the respondent; whereas it was contended that, by stat. 11 & 12 Vict. c. 43, s. 27, and by stat. 12 & 13 Vict. c. 45, s. 5, the order ought to have ordered the costs to be paid to the clerk of the peace; and *Reg. v. Hellier* (1) was cited, wherein an order was quashed on this ground.

[*179] But it appears to us that the order in question is free from the objection so relied on; for it was made upon *an appeal against a poor rate; and stat. 17 Geo. II. c. 38, s. 4, empowers the Sessions, upon such an appeal, to order payment of costs in the form here used; and this statute is now in force, unrepealed and unaltered by any subsequent statute. The order now before us is therefore valid.

Stat. 11 & 12 Vict. c. 43, s. 27, relates only to appeals against summary convictions and other orders of justices mentioned in that statute, and does not extend to appeals against poor rates; and *Reg. v. Hellier* (1) was an appeal against an order of justices comprised within this statute. By stat. 12 & 13 Vict. c. 45, s. 5, the Court of Quarter Sessions, upon all appeals, may order the one party to pay costs to the other party, recoverable in the manner pointed out by stat. 11 & 12 Vict. c. 43, s. 27. The words of this section, in their ordinary meaning, would authorize all orders for costs to be made in the form of the order now before us: and, even if the addition making such costs recoverable in the manner pointed out by stat. 11 & 12 Vict. c. 43, s. 27, can be thought to require the original order to direct the costs to be paid to the clerk of the peace, still it does not take away any former power of awarding costs, nor alter the form of awarding costs under such former power. It is a cumulative general authority, upon all appeals to give costs; and the better construction seems to be to give to the successful party the right to proceed for the recovery by applying for a distress warrant, and, if need be, a commitment under sect. 5, and also, if need be, by removing the order by *certiorari*, to take out execution as upon a judgment, under sect. 18.

[180] But the present order is valid under stat. 17 Geo. II. c. 38, s. 4, whatever be the effect of stat. 12 & 13 Vict. c. 45, s. 5. Therefore the present rule must be discharged, and with costs.

Rule discharged with costs.

(1) 17 Q. B. 229.

DEAN *v.* HORNBY (1).

(3 El. & Bl. 180—193; S. C. 2 C. L. R. 1519; 23 L. J. Q. B. 129; 18 Jur. 623.)

1854.
Jan. 17.
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A ship was insured on a time policy, for a year ending 21st April, 1852. In December, 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan: in January, 1852, she was recaptured by an English war steamer; and a prize master took the command, and brought her to Valparaiso. Intelligence of all these facts reached the owners, at one time, about the end of April, 1852; and they, on 30th April, 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to her Majesty's steamer." The underwriters refused to accept.

The vessel was sent home by the recaptors from Valparaiso, under the command of a prize master, with instructions to proceed to Liverpool, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into Fayal on 19th August, 1852, where she was sold by the prize master, being then in a state not justifying the sale.

In December, 1852, the owners commenced an action against the underwriters, claiming for a total loss: Held, that they were entitled to recover as for a total loss, there having been a total loss by the piratical seizure, in the first instance, and the owners not having afterwards, up to the time of the commencement of the action, had either actual possession or the means of obtaining it: and it being immaterial whether there was or was not a right of detainer against the owners.

That the notice of abandonment was early enough, being given in reasonable time after the receipt of the intelligence of the loss (2).

That the inaccurate statement of the vessel having been condemned as a prize at Valparaiso did not vitiate the notice.

ACTION on a policy of insurance upon the vessel *Eliza Cornish*. The writ issued on 9th December, 1852: and the parties, under stat. 15 & 16 Vict. c. 76 (The Common Law Procedure Act, 1852), s. 46, desired the opinion of the Court on a case in substance as follows:

The *Eliza Cornish* was insured from the 22nd of April, 1851, to the 21st April, 1852, both days included. The case set out the policy, whereby the plaintiffs effected the insurance on the ship, valued at 1,800*l.*; and among the perils insured against were "pirates" and "takings *at sea." The policy was duly underwritten by the defendant and fifteen other underwriters.

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On 7th November, 1851, the *Eliza Cornish* set sail on her homeward voyage from Valparaiso to Liverpool, with a cargo and crew consisting of the master and six hands. On 1st December, 1851, she put into Punta Arenas, in the Straits of Magellan, to repair some

(1) *Rankin v. Potter* (1873) L. R. 6 H. L. 83, 42 L. J. C. P. 169, 29 L. T. 142; *Cory v. Burr* (1883) 8 App. Cas. 393, 52 L. J. Q. B. 637, 49 L. T.

78; *Ruys v. Royal Exchange Assurance Corporation* [1897] 2 Q. B. 136, 66 L. J. Q. B. 534.

(2) See 6 Edw. VII. c. 41, s. 62.

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slight sea damage she had received. On the same day she was boarded by an armed force from the shore, who took forcible possession of her, and placed the master and crew under restraint, and conveyed them as prisoners ashore. The persons who committed this outrage were Chilians, acting under the orders of one Lieutenant Cambiaso. The Chilian Government had a penal settlement at Punta Arenas, which had been placed under the charge of a governor, named Munioz, of a Captain Salas, and others, among whom was Lieutenant Cambiaso, and a few soldiers. Shortly after the arrival of the *Eliza Cornish*, there was a mutiny and insurrection at the settlement. Cambiaso and some of the soldiers conspired with some of the convicts against Munioz. Munioz was shot by them, the soldiers overpowered; and Cambiaso assumed the command. Nothing was known of these events by those on board the *Eliza Cornish* when she put into Punta Arenas as aforesaid, as a friendly port. Having taken possession of the said vessel as aforesaid, the insurgents under the command of Cambiaso shot the master, and kept the crew in confinement. The insurgents threw overboard all the upper part of the cargo, consisting of guano, cocoa and bark, and plundered her of treasure amounting to about 20,000*l.* sterling. The mate of the vessel remained in confinement until [*182] 18th December, 1851; when, fearing *that he would be shot if he refused, he agreed to navigate the vessel to Aranco; and he and the remainder of the crew prepared the vessel for sea again, working under a guard of soldiers, and being placed in confinement on shore at night.

On the 31st December, from 180 to 200 persons were placed on board, with cannon and other arms, and a piratical flag. On the 2nd January, 1852, the vessel got under weigh, in company with the *Florida*, an American vessel, which Cambiaso's party had also seized; Cambiaso taking command of the *Florida*, and his second in command named Briones, [taking] command of the *Eliza Cornish*. Briones and his men exercised themselves with arms, and occasionally hoisted the piratical flag.

On 28th January, 1852, before the *Eliza Cornish* got clear of the Straits of Magellan, she was rescued by her Majesty's steamship *Virago*; which vessel had been sent from Valparaiso for the purpose, at the request of the Chilian Government: and most of the treasure, which was found on the persons of the insurgents who were on board the *Eliza Cornish* and the *Florida*, was recovered and re-shipped on board the *Eliza Cornish*. The commander of the *Virago*

took possession of the *Eliza Cornish*, and put two officers and some men in charge of her, with directions to take her to Valparaiso. She arrived at Valparaiso on the 23rd February, 1852, where she remained in the custody and possession of the officer of the *Virago*.

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On 10th March, 1852, she again left Valparaiso for Liverpool, with the remainder of her cargo, in charge of one Charles Bowden, one of the commissioned officers of her Majesty's ship *Dædalus*, with two other officers *and eight seamen belonging to the *Virago* and *Dædalus*. These officers and men were placed in charge of her by the commander of the *Virago*, who sent her to England, with instructions to have the matter adjudicated upon by the Court of Admiralty. The mate and four of the crew of the *Eliza Cornish* also remained on board. The *Eliza Cornish* had received no damage, and sailed from Valparaiso with much the largest part of her cargo, which was very valuable. The vessel, on her homeward voyage, met with bad weather, and bore up for Monte Video, to repair sea damage on 14th April, 1852. She arrived there on 24th April, 1852. She sailed again, after being repaired, on 25th June, 1852; and, having again met with bad weather, and suffered damage, she was obliged to put into Fayal, where she arrived on 19th August, 1852. On 21st August, 1852, she was surveyed; two subsequent surveys were held upon her; when the surveyors recommended that she should be sold as unfit for repairs: and she was afterwards sold by the said Charles Bowden; and the proceeds of the sale were received by him. From the time she last left Valparaiso until the time of her sale at Fayal, she was in the possession and under the controul of the said Charles Bowden, under the circumstances before mentioned. She was repaired by the purchaser at a trifling expense, and has since arrived in England; and therefore Mr. Bowden was not justified in selling her.

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In the early part of 1853, after it was discovered that the *Eliza Cornish* (her name having been changed to the *Segredo*) had arrived in England, proceedings were taken against her in the Admiralty Court by the plaintiffs and defendant in concert; which proceedings, by previous agreement between them, were to be without *prejudice to either of the said parties as to their legal rights under the circumstances above set forth, as if such proceedings had not been taken. And, the Court of Admiralty having decreed the possession to the owners, she has been sold, with the consent of the plaintiffs and defendant, and the money deposited to await the result of this case. The plaintiffs received intelligence of the seizure of the vessel at

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Punta Arenas, of her capture by the *Virago*, and of her having been taken to Valparaiso in charge of a prize crew, at the same time, viz. about the end of April, 1852. And, on the 30th of that month, they addressed to the defendant and the other underwriters the following notice of abandonment.

“LIVERPOOL, 30th April, 1852.

“MESSRS. HEADLAM AND LANGTON, Liverpool.

“GENTLEMEN,—Having been informed by Mr. Myers, of the firm of W. J. Myers & Co., that intelligence has arrived of the condemnation at Valparaiso of the brigantine *Eliza Cornish*, as a prize to her Majesty’s steamer *Virago*, we will thank you to inform the underwriters on our policy on that vessel, effected through you for 800*l.*, on the 14th May, 1851, that we abandon to them and the other underwriters in that vessel at Lloyd’s, London, our interest therein, and claim a total loss on our policies. And will thank you to send us in a credit note for the amount as customary.

“We remain, &c.

“DEAN AND MILLS.”

To which they received the following reply.

[*185] “GENTLEMEN,—We have received your favour of yesterday, tendering *abandonment to the underwriters of the *Eliza*, as far as regards a policy for 800*l.*, of 14th May, 1851; and we are instructed by them to decline accepting of the same for the present.

“Yours truly,

“HEADLAM AND LANGTON.”

Neither the mate nor the crew of the *Eliza Cornish*, or any one else on the plaintiffs’ behalf, ever had possession of or controul over the said vessel after she was first taken possession of on 1st December, 1851, at Punta Arenas, by the Chilian insurgents.

The Court is to be at liberty to draw any conclusion of fact which a jury might draw. And, in case the Court should be of opinion that an average loss only has been incurred, the amount is to be settled out of Court by an average adjuster agreed upon between the parties. And the opinion of the Court is desired, “Whether the plaintiffs are entitled to be paid by the defendant as for a total or for an average loss for the said vessel, under the said policy.”

J. P. Wilde, for the plaintiffs :

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This is a case of loss by pirates. On 1st December, 1851, the vessel was in the hands of a piratical force; and nothing that has since occurred has altered that state of things, so far as regards the relation of the assured to the assurer. It is true that, when the owner recovers the vessel before action brought, he cannot recover as for a total loss: not that, even then, the loss has not been total, but because, the contract of insurance being simply for indemnity, the owner, having ultimately not been damaged, cannot recover. But here the owner did not recover possession at all up to the time of the *commencement of the action: whether the vessel was wrongfully detained or not is immaterial. In *Holds-worth v. Wise* (1) a ship was deserted by the crew, being in a leaky state; and the owners gave notice of abandonment: it afterwards turned out that, before the notice was given, the crew of another vessel had taken possession of her, and that she had been repaired, the expense of salvage and repairs equalling or exceeding her value: and it was held that the owners, having given the notice before they heard of her safety, were entitled to recover for a total loss. *Parry v. Aberdeen* (2) and *M'Iver v. Henderson* (3) are authorities to the same effect. In *Thornely v. Hebson* (4), which may be relied upon as an authority the other way, there never was a total loss: the owners were never dispossessed of the vessel. What has taken place since the commencement of the action is immaterial.

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(*Cowling*, for the defendant, admitted this.)

The parties now holding the vessel have a claim for salvage, and therefore a lien under which the vessel may be detained: *Hartfort v. Jones* (5).

(LORD CAMPBELL, Ch. J.: That seems not essential to your case: the illegality of the detainer would not prevent the loss from remaining total, any more than the illegality of the act of the pirates prevented this from being a total loss in the first instance.)

Cowling, contra :

There was no total loss at the time of the abandonment: and the notice of abandonment was given under a mistake either of facts or

(1) 31 R. R. 299 (7 B. & C. 794).

(4) 21 R. R. 381 (2 B. & Ald. 513).

(2) 33 R. R. 221 (9 B. & C. 411).

(5) 1 Ld. Ray. 393.

(3) 16 R. R. 550 (4 M. & S. 576).

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of law. Before that notice, the vessel had been taken possession of by the *Virago*: after that, there was no loss. The notice appears to rely on the "condemnation at Valparaiso" "as a prize to her Majesty's steamer *Virago*." But no such condemnation could be legal. Had the notice been given while the vessel was in the hands of the pirates, there would at that time have been a total loss, for which the plaintiffs might have recovered, subject to such events as might occur before the action brought. But, upon the recapture, the property was in the owners: the possession was indeed in the Queen, but not a beneficial possession. She, by her servants, held the vessel for the purpose of doing justice to the parties really interested: case of *Piracy* (1). * * In *Thellusson v. Shedden* (2) Sir JAMES MANSFIELD, delivering the judgment of the Court, said: "It is true that a capture simply proved establishes a total loss; but where the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only." The same doctrine is assumed in the judgment of the Court in *Roux v. Salvador* (3). In *Knight v. Faith* (4) this Court, *quoting from the case last cited, states the test of the right to abandon to be "if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished."

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(LORD CAMPBELL, Ch. J.: Do you say that the mere legal right to recover possession, without the immediate means of obtaining it, does away with a total loss?)

Where it is reasonably certain that the owner will regain possession, so that in effect his possession is only retarded, there cannot be an absolute total loss. If the master, under these circumstances, had sold the vessel, the sale would have been illegal: the parties who here sold had no more authority than the master; and the sale has the same effect as a sale by him: this was the view taken in the Admiralty Court by Dr. LUSHINGTON in the case of this ship.

(LORD CAMPBELL, Ch. J.: Can you say that the vessel has arrived in England in pursuance of her voyage? She has merely traversed the same track on the ocean.)

(1) 12 Co. Rep. 73.

(2) 2 Bos. & P. N. R. 228, 230.

(3) 43 R. R. 638 (3 Bing. N. C. 266).

(4) 81 R. R. 725 (15 Q. B. 649).

At the least, she has come to England for the purpose of adjudication by the Admiralty Court: that, under the circumstances, was the regular and proper course. *Bainbridge v. Neilson* (1) was much like this case. A vessel having been captured, the owners abandoned her: she had at that time been recaptured; but the owners did not learn this till after they had given the notice; and they persisted in the notice, though the vessel was restored to them without damage: it was held that they could not treat this as a total loss.

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(LORD CAMPBELL, Ch. J.: Is not the rule this: that, to get rid of the total loss, the vessel must be *in esse* and the owner have the means *of obtaining possession?)

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That rule seems too narrow: when a vessel is at sea the owner cannot take actual possession; surely in such a case it must be enough that the vessel is known to be under such circumstances that the party in possession holds for the owner. * * There is, further, a question whether the notice of abandonment was not too late.

(The Court intimated their opinion that the notice was given in reasonable time after the intelligence of the loss arrived.)

J. P. Wilde, in reply. * * *

LORD CAMPBELL, Ch. J.:

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I am of opinion that, according to English law, the plaintiffs, in conformity with decided cases, are entitled to judgment. The underwriters undertake for the safety of the ship from April, 1851, to April, 1852. In December, 1851, she is taken by pirates. Then, in fact, a total loss has occurred. After that, she never is restored to the owners; nor have they had an opportunity of regaining possession. They have lost the possession by events over which they have no controul, and therefore are entitled to the indemnity for which they have paid. The cases referred to establish this principle: that, if once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. The right to obtain it is nothing: if that were enough to prevent a

(1) 10 R. R. 316 (10 East, 329).

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total loss, there never would in this case have been a total loss at all; for pirates are the enemies of mankind, and have *no right to the possession. The question therefore is, Had the owners ever, after the capture, the possession or the means of obtaining possession? That principle is to be found in *Holdsworth v. Wise* (1), *Parry v. Aberdein* (2) and *M'Iver v. Henderson* (3). In *Bainbridge v. Neilson* (4), which is a case relied upon by Mr. Cowling, the property was actually restored before the action was brought. In *Thornely v. Hebson* (5) the owners, before they brought the action, had the means of obtaining possession. In both cases the principle is acknowledged. At what time, in the present case, did there cease to be a total loss? When had the assured either the possession or the means of obtaining it? Whether the detainer was rightful or wrongful is immaterial: for the possession was taken away by the plaintiffs and never restored to them. The notice of abandonment was abundantly early, having been given in quite reasonable time after the receipt of the intelligence of the loss; for the statement of the case upon this point is, that the plaintiff, about the end of April, 1852, received at one time the intelligence of the seizure by the pirates, of the recapture, and of the arrival at Valparaiso; and notice of abandonment was given on the 30th of the same April. The fact that the policy of insurance expired on the 21st of that April would only prevent the underwriters from being liable for any event occurring after that day. It is true that the notice speaks of a "condemnation" at Valparaiso; and that is inaccurate: but we must suppose that the notice proceeded on these *facts. Under these circumstances, I am of opinion that the plaintiffs were entitled to abandon.

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COLERIDGE, J.:

I am of the same opinion. There was a capture by pirates; and, if that were all, there would unquestionably be a total loss. The question, therefore, is as to what has occurred since. The vessel is recaptured by an English man of war; a prize master is put on board, and she is brought back to England, not on her original voyage, but with a view to proceedings in the Court of Admiralty. She receives damage, and is ordered to be sold. These are all the facts that are material; for we have nothing to do with what

(1) 31 R. R. 299 (7 B. & C. 794).
 (2) 33 R. R. 221 (9 B. & C. 411).
 (3) 16 R. R. 550 (4 M. & S. 576).

(4) 10 R. R. 316 (10 East, 329).
 (5) 21 R. R. 318 (2 B. & Ald. 513).

occurred in the Admiralty Court, nor is the question of the right to the possession material; that right was never out of the plaintiffs. But the material question is, Whether the possession was ever restored to the plaintiffs; and it never was, from the first to the last. As to the notice of abandonment, I agree with my Lord that it is enough if this is given in reasonable time, and that the time here was reasonable.

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WIGHTMAN, J. :

The question here is, Whether that which was at one time a total loss has been converted into a partial one. To make that so, the circumstances ought to be such as either to restore the possession to the assured, or to afford them the means of obtaining possession. Here there never was a restoration in fact, nor the means of regaining possession: what was done after the capture by the pirates was the act of the recaptor, the vessel remained out of the controul of the assured; the recaptor brought her to another port, *where she was sold; and she was then brought to England. The assured, therefore, never had an opportunity of taking possession; and there never ceased to be a total loss. The case is not unlike *Cologan v. London Assurance Company* (1).

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(CROMPTON J. was absent.)

Judgment for plaintiffs, for total loss.

JORDAN v. WILCOXON.

(3 EL. & BL. 193—194; S. C. 18 JUR. 555.)

1854.
Jan. 19.

[The only point in this case was as to the extent of the application of the obsolete rule of practice that an application to set aside a Judge's order must be made before the end of the Term next following the making of the order.]

DEWHURST v. CLARKSON.

(3 EL. & BL. 194—219; S. C. 2 C. L. R. 1143; 23 L. J. Q. B. 247; 18 JUR. 693.)

1854.
Jan. 19.

Where an amendment of the rules of a Friendly Society has received the barrister's certificate, under stat. 4 & 5 Will. IV. c. 40, s. 4, such amendment is valid, though there has been no resolution of the Society in compliance with the enactments of stat. 10 Geo. IV. c. 56, s. 9, or with the rules of the Society incorporating that section. Per Lord CAMPBELL, COLERIDGE and WIGHTMAN, JJ.: *dissentiente* ERLE, J.

The rules of a Society directed that three trustees should be appointed,

(1) 17 R. R. 390 (5 M. & S. 447).

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of whom one should be treasurer, in whose names the funds of the Society should be invested: and that the treasurer should invest the unappropriated stock exceeding 50*l.* as the board of management should direct, pursuant to stat. 13 & 14 Vict. c. 115. Three trustees were elected; but a fourth person was elected treasurer: Held, that the three trustees could not sue a former treasurer for the balance in his hands, under these rules: and that they had no title to do so under stat. 10 Geo. IV. c. 56, or stat. 13 & 14 Vict. c. 115, which were prior to the rules taking effect.

[Superseded by later authority and legislation: see *Rosenberg v. Northumberland Building Society* (1889) 22 Q. B. D. 373, 60 L. T. 558; 59 & 60 Vict. c. 25, ss. 13, 25 and 55. The statutes referred to in the head-note were all repealed by 18 & 19 Vict. c. 63, s. 1.]

1854.
Jan. 20.

VICK v. JANE SUETER.

(3 EL. & BL. 219—236; S. C. 23 L. J. Q. B. 212; 18 Jur. 625.)

Devisor, being seised in fee of copyhold lands including the Mill Field, by will made before 1st January, 1838, devised certain parcels of freehold land to S. in fee chargeable with an annuity of 60*l.* to his wife for life, the first payment thereof to be made within three months of the devisor's decease. "Also I give and devise all that my copyhold estate called the Mill Field, consisting of seven messuages," &c., "situate at" &c., "unto my niece Sally," "for and during the term of her natural life, charged and chargeable, nevertheless, and I hereby charge the said copyhold estate so given to my said niece Sally, to and with the payment of one annuity or clear yearly sum of 25*l.* unto my brother" E. S. for life, payable half-yearly, the first payment to begin within three calendar months next after devisor's decease; "and, from and immediately after the decease of my said niece Sally, I give and devise the same copyhold hereditaments unto and equally between all and every the children of my said niece, share and share alike." "Also I give and devise" freehold land described, "also all and every my other copyhold messuages or tenements, lands, tenements and hereditaments," "wheresoever situate, unto my niece Ann, her heirs and assigns, charged and chargeable, nevertheless, and I hereby charge the same, to and with the payment of one annuity or clear yearly sum of 20*l.* unto my said wife (in addition to the annuity of 60*l.*)," "for and during the term of her natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months after my decease." There was also a devise of "all and every other my real estates, not hereinbefore otherwise disposed of," to V. in fee:

Held, that the devise to the children of Sally passed only a remainder for life.

That the devise to Ann passed, not the reversion in the Mill Field, but the other copyholds undisposed of.

And that therefore the ultimate remainder in fee in the Mill Field passed to V.

[Superseded by the Wills Act, 1837 (1 Vict. c. 96), s. 28.]

THOMPSON v. BELL.

(3 El. & Bl. 236—248; S. C. 23 L. J. Q. B. 159; 18 Jur. 603.)

[This action related merely to a question of pleading, which was rendered obsolete by the Judicature Acts and Rules.]

1854.

Jan. 20.

REG. v. COAKS (1).

(3 El. & Bl. 249—255; S. C. 2 C. L. R. 947; 23 L. J. Q. B. 133; 18 Jur. 378; 22 L. T. O. S. 239.)

1854.

Jan. 21.

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Information in the nature of *quo warranto* for the office of mayor of a borough. Issue whether defendant was duly elected. Special verdict, in substance as follows: At an election for councillor for the borough, in November, 1851, B. and C. were candidates. B. at the time was disqualified, being an alderman, which fact was known to the voters. B. had a majority of votes, and was returned, accepted the office and acted. C. obtained a rule for an information in the nature of a *quo warranto*, which was made absolute in Easter Term, 1852. The information was filed. B. disclaimed; and judgment of ouster was signed on 3rd July, 1852. On 26th October, 1852, C. gave notice to the town council requiring them to admit him, on the ground that the votes for B. had been thrown away. On 8th October, 1852, C. accepted the office and signed the declaration required by the statute: of all which the town council had notice. On the 9th November, an election was held for the office of mayor: the defendant and M. were candidates. C. tendered his vote for M. It was rejected; and, the other votes being even, defendant was elected by the casting vote of the presiding officer:

Held, that the votes given for B. were thrown away: and that C. was councillor; that, the usurpation of the office by B. having rendered it impossible to accept the office within five days after notice of his election, he was excused from doing so; and that when B. was ousted C. ought to have been admitted.

Held also, that supposing C. had been bound to accept within five days after notice, the special verdict did not show that C. had notice of his election, inasmuch as it only disclosed evidence of that fact.

Held therefore, on both grounds, that it appeared on the special verdict C.'s vote at the election of mayor was improperly rejected.

Judgment for the Crown.

INFORMATION in the nature of *quo warranto* for exercising the office of Mayor of Norwich. Plea: That the city of Norwich is named in Schedule (A.) to stat. 5 & 6 Will. IV. c. 76, and was in pursuance of that Act divided into eight wards; that there are sixteen aldermen and forty-eight councillors of the said city. That defendant was, during his tenure of the office of mayor and for two preceding years, a rated householder qualified to be a burgess, and actually on the burgess list, and qualified to be a

(1) *Reg. v. Tewkesbury* (1868) L. R. 349, 56 L. J. Q. B. 326; *Pritchard v. 3 Q. B. 629*, 37 L. J. Q. B. 288, 18 L. T. *Mayor of Bangor* (1887) 13 App. Cas. 851; *Reg. v. Bangor* (1886) 18 Q. B. D. 241, 57 L. J. Q. B. 313, 58 L. T. 502.

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councillor, and was, on 9th November, 1851, duly elected to be a councillor, and that no application for a *quo warranto* against him for holding the office of councillor was made for twelve months after his election; and that, on 9th November, 1852, “at a meeting of the council of the said city of Norwich, duly convened and held according *to the statutes, for the election of a mayor of the said city, the defendant, being such councillor, and being a fit person to be mayor of the said city, and being entitled to be on the citizens’ list of the said city, and in every respect qualified to be mayor of the said city, was duly and in accordance with the provisions of the said Act by the council of the said city, duly and according to the statutes in such case made and provided, elected to be the mayor of the said city for one whole year then next and until his successor should have accepted the said office, and made the requisite declaration in that behalf. Averments of acceptance, declaration, and qualification on defendant’s part; and by that title he claimed the office.

Replication: That defendant “was not, duly and according to the statutes in such case made and provided, elected to be the mayor of the said city of Norwich,” *modo et formâ*: conclusion to the country. Issue thereon.

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Special verdict. That Richard Cundall was, in November, 1851, in all respects qualified to be a councillor; that, at an election of two councillors for the fourth ward, then held, Charles Winter, Robert Wiffin Blake and the said Richard Cundall were candidates; that the number of votes for each were: for Winter, 146; for Blake, 117; and for Cundall, 112. That Blake then was disqualified to be a councillor, being an alderman; that those who voted for Blake had notice that he was disqualified; nevertheless the presiding officer declared Winter and Blake elected councillors. That Blake accepted the office of councillor and acted as such. That, on 7th May, 1852, the present relator obtained a rule absolute for an information in the nature of a *quo warranto* against Blake; that, on 14th May, 1852, *the information was filed; that, on 30th June, 1852, Blake disclaimed; that, on 3rd July, 1852, judgment of ouster was signed against him; that, on 26th October, 1852, notice in writing was given by Cundall to the mayor, aldermen and citizens of the city of Norwich, requiring them to admit him as councillor, instead of Blake, on the ground that the votes given for Blake had been thrown away, and that therefore Cundall was duly elected. That on 8th November, 1852, Cundall accepted the office of

councillor, and made and subscribed the oaths and declaration required by the statutes: of all which the then mayor and the town clerk had notice. That, on 9th November, 1852, at the meeting of the council for the election of a mayor for the ensuing year, two councillors, the defendant and Samuel Bignold, were candidates; that Cundall tendered his vote as councillor for Bignold, which vote the then mayor rejected: that the votes, excluding that of Cundall, were twenty-seven for defendant, and the same number for Bignold; and thereupon the then mayor gave his casting vote for the defendant. And the jury referred it to the Court to say whether the defendant was duly elected.

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Welsby, for the relator :

The whole question turns upon Cundall's right to vote in the election of mayor. If he was properly rejected, the defendant was rightly elected; if he was improperly rejected, the defendant is an usurper. It is clear that Cundall ought originally to have been returned instead of Blake; for the votes for the latter, being given after notice of his disqualification, were thrown away: *Ree v. Hawkins* (1). If Cundall had *been returned, it would have been his duty, within five days after he had notice, to accept the office, making and signing a declaration, according to stat. 5 & 6 Will. IV. c. 76, s. 51, under penalty of a fine, and of the office being vacant. But, the office being full of Blake, he could not comply with that section, which must be taken to be confined to cases in which it can be complied with. The notice means official notice: *Reg. v. Preece* (2). Cundall never had such official notice till after the office was full; and he could do nothing till ouster.

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Willes, *contra* :

Cundall did not in fact comply with sect. 51 by making and subscribing the declaration, till the 8th of November, 1852. Unless, therefore, he was taken out of the operation of sect. 51, and entitled to hold the office without making the declaration within the five days, the office of councillor was vacant, and there should have been a new election under sect. 47. The officer presiding at the election of mayor could not enquire whether the voters for Blake had or had not, at the time of his election as councillor, notice of his want of qualification. All that he could do was to look at the list under sect. 35, where he would not see Cundall's name. The

(1) 10 East, 211.

(2) 64 R. R. 457 (5 Q. B. 94).

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person put on that list is in the possession of the office : *Reg. v. The Mayor, &c., of Leeds* (1).

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(CROMPTON, J. : According to your argument, there must always be a new election whenever the wrong person has been returned, for whatever reason. There have been very many cases in which elections have been set right where the return had been made in consequence of the personation *of voters and similar causes ; yet your position is quite new. The practice has, I think, been to take a *mandamus* to admit the party, which no doubt is convenient ; but the *mandamus* cannot give a title ; it presupposes a title to be admitted.)

At all events he should have made the declaration under sect. 51.

(LORD CAMPBELL, Ch. J. : At what time ?)

He might have done so within five days after he knew of his election in November, 1851 ; but it is not necessary to go so far. It is sufficient to say that he ought to have done so within five days of his having notice of the ouster. Here, on 26th October, he gives formal notice himself of the fact ; and he does not make the declaration till the 8th November.

Welsby, in reply, was desired by the COURT to confine himself to the last point :

Sect. 51 applies only to a person having notice of the original election, and able to comply with it. It cannot be that a person is liable to a fine for not accepting an office already full of an usurper. But the special verdict does not raise the question. The notice given on 26th October by Cundall is very cogent evidence that Cundall had himself had notice ; but it is not conclusive of the fact ; and in a special verdict facts, not evidence, must be found.

LORD CAMPBELL, Ch. J. :

I must say this appears to me to be a clear case. It depends entirely on Cundall's right to act as a councillor on 9th November, 1852. If he had a right so to act, the defendant was not then duly elected as mayor, and is an usurper. Now Cundall clearly was elected councillor in November, 1851, just as much as if Blake had not then stood at all. Blake was, in fact, a candidate ; but he was

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an alderman, and *therefore ineligible ; and that fact was known to the electors. Now it is the law, both the common law and Parliamentary law, and it seems to me also common sense, that, if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person ; as it has been said, as if he gave his vote for the Man in the Moon. That was clearly the law before the Municipal Corporation Reform Act ; and there is nothing in that Act to alter it. Sect. 35 says that such persons, “ as shall have the greatest number of votes, shall be deemed to be elected.” Now Cundall had the greatest number ; for the votes for Blake were thrown away. But *Mr. Willes* now argues, as the returning officer, in violation of his duty, returned Blake, and Blake usurped the office and acted in it, that, when he was ousted, there must be a new election. But there was no vacancy then ; Cundall had been duly elected, and was entitled to be admitted. That brings us to the question whether he was too late in the steps he took to be admitted. Now, first, I think that the provision in sect. 51, that “ every such person so elected shall accept such office by making and subscribing the declaration hereinbefore mentioned within five days after notice of his election, otherwise such person shall be liable to pay the said fine as for his non-acceptance of such office, and such office shall thereupon be deemed to be vacant,” is not applicable to such a case as this. It applies to a case where a person has been returned, and has notice that he has been returned, and can accept the office. Then he must do so, or he incurs a penalty. But it is not applicable where the person has not been returned, but another has, so that he cannot accept the office till after the usurper has *been ousted by *quo warranto*. In such a case the penalty cannot apply to a person who has not the power of complying with the enactment. And, further, I think that, if the law was otherwise, the special verdict in this case does not find that Cundall had notice of his election. I think, therefore, the defendant is an usurper, and that judgment must be for the Crown.

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CROMPTON, J. (1) :

I think it quite clear that, when Blake was ousted by the *quo warranto*, there ought not to have been a new election, but that Cundall was entitled to be councillor, and might claim to be admitted. If any difficulty was made about admitting him, he

(1) Coleridge, J. had gone to chambers. No fourth Judge sat on this day.

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might have applied for a *mandamus* to admit him, and he would have had it: but the *mandamus* would go on the ground that he had a right to be admitted, and that a new election was not required. Then sect. 51 prescribes the manner in which a person shall accept the office and be admitted to it; Cundall did so accept the office on 8th November, 1852; and I think from that time it is clear that, subject to the other point, viz. whether he did so in time, he was councillor and entitled to act. As to the other point, I agree with my Lord on both grounds: that the enactment requiring the party to accept within five days after notice does not apply to such a case; and that the special verdict does not show that Cundall had five days' notice.

Judgment for the Crown.

1854.
Jan. 23.
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HEATH v. SMITH.

(3 EL. & BL. 256—273; S. C. 2 C. L. R. 1584; 23 L. J. Q. B. 166; 18 Jur. 601; 22 L. T. O. S. 257.)

To a declaration for infringement of a patent, the defendant pleaded that the invention was not new, but had been publicly and generally practised and used in England before the date of the patent.

It was proved that, before the date of the patent, five different persons had used the process independently, three of them without concealment, and all five had publicly and generally sold, for their own profit, the article thereby produced. It did not appear that there had been any other publication of the invention: Held that, upon this evidence, the plea was proved.

Semble, per ERLE, J., that the plea would have been proved by evidence that, before the date of the patent, any one person had, for his own profit, produced the article by the process, and sold it publicly and generally, though he had used the process secretly, and concealed its nature.

COUNT by plaintiff, as administratrix of Josiah Marshall Heath, stating that the intestate was the inventor of a new manufacture, that is to say of certain improvements in the manufacture of iron and steel; and that the Queen, by letters patent, duly sealed &c., granted to him, his executors, administrators and assigns, the sole privilege to make, use, exercise and vend the invention within England, for fourteen years, from 5th April, 1839, subject to the condition of inrolling a specification within six calendar months, which the intestate fulfilled: and that defendant infringed the patent during the term.

Plea 1. Not guilty. Issue thereon.

The only other plea material to the point now decided was:

4. That the invention was not, at the time of the making and granting of the letters patent, a new invention, but, on the contrary

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thereof, had been, wholly and in part, publicly and generally practised, used and vended in England, and in divers places therein, on divers days and times before the date and grant of the letters patent: by reason whereof the rights, liberties, *privileges, benefits, monopolies and advantages by the letters patent granted, and the prohibitions therein contained, were, at the time of the granting of the letters patent, and at all times, wholly void; and the same were at all times wholly lost and forfeited to and by the said J. M. Heath. The plaintiff took issue upon this.

On the trial, before Erle, J., at the last Liverpool Assizes, it appeared that the intestate, by his specification, declared the nature of his inventions to be:

“First, the extraction of pure cast-iron from certain ores of that metal, without the intervention of any earthy alkaline or saline matter to form a vitreous flux, cinder or slag; secondly, the formation of cast-steel, by fusing the said pure cast-iron along with malleable iron, or certain metallic oxides, in such proportion as may decarburate the cast-iron to a certain degree, and by completing the decarburation in a suitable cementing furnace; thirdly, the use of a certain portion of oxide of manganese in the process of converting cast-iron into malleable iron by the process of puddling; and, fourthly, the use of carburet of manganese in any process whereby iron is converted into cast-steel.” The specification then detailed the processes to be used for carrying into effect certain parts of the invention, not material to the question which came ultimately before the Court; and stated as follows: “Lastly, I propose to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel (broken as usual into fragments), or mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet *of manganese, and exposing the crucible to the proper heat for melting the materials, which are when fluid to be poured into an ingot-mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of the carburet of manganese, in any process for the conversion of iron into cast-steel.” Then followed the statement of claim, divided into four heads, of which the first three are not here material: the fourth and last was: “and, fourthly, the employment of carburet of manganese in preparing an improved cast-steel.”

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By the evidence it appeared that, before the taking out of the patent, it had been known that cast-steel, of improved quality, would be formed by the use of the oxide of manganese: but that a difficulty in employing this arose from the destruction of the crucible in which the steel was melted, the manganese breaking the crucible by combining with its carbonaceous matter, so that the charge of steel was lost. In the patented process this inconvenience was obviated. The result of this was that a quality of cast-steel, which previously could be obtained only from superior foreign iron or steel, could be formed from English iron ore. The case for the plaintiff, as to the infringement, was, that the defendant, though he had not used carburet of manganese ready prepared, had formed a flux by putting into the crucible, along with the blistered steel, black oxide of manganese together with carbonaceous matter (coal tar); and that the oxide of manganese entered into union with the carbon at a temperature lower than that necessary for melting the *steel, so that, before the steel was melted, a carburet of manganese was formed in the crucible: the consequence of which was that, when the temperature was elevated sufficiently to melt the steel, the carburet of manganese, already formed in the crucible, melted at the same time, or before, and entered into alloy with the steel, as the latter melted, so as to produce the same effect as the patented process, and upon the same principle. Evidence was given that the plaintiff discovered this mode of making the carburet in the pot with the steel, after the grant of the letters patent, and had communicated it to the public. For the purpose of the trial, it was assumed that what the defendant had done was an infringement of the patent.

The defence was that the same process had been used before the patent was granted. Evidence was given that five different firms had practised the process before the grant: it appeared that two of these firms had conducted it with precautions for preventing it from becoming known; but that, in the case of the other three, no concealment had been attempted, the process being known to all such workmen as were successively employed by the firms, and no injunctions having been imposed as to secrecy. The five firms had all publicly and generally sold the steel produced for their own profit. Except as above, the process had not been made public before the grant of the patent.

The learned Judge expressed his opinion that, if this evidence [*260] was believed, the invention was not new: and, *the counsel for

the plaintiff admitting that the truth of the evidence could not be disputed, his Lordship directed a verdict for the defendant on the issue on the fourth plea, and for the plaintiff on all the others.

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In Michaelmas Term, *Sir A. J. E. Cockburn* obtained a rule *nisi* for a new trial on the ground of misdirection.

Sir Fitzroy Kelly, T. Jones and Deighton showed cause :

The question is, whether an invention be new when the process has been used, without concealment, by manufacturers, for their own profit, but not formally published to the world. By sect. 6 of stat. 21 Jac. I. c. 3, the monopoly is given only "to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use." Nothing is there said as to the publicity or generality of the user.

(LORD CAMPBELL, Ch. J. : If a party by his own experiments completes a discovery, and uses it, can he, unless within a reasonable time, obtain a valid patent ?)

It seems that he cannot: were it otherwise, a monopoly might practically be obtained for more than the fourteen years. But can any other person, who subsequently makes the discovery, have a patent under these circumstances ?

(LORD CAMPBELL, Ch. J. : And against the earlier inventor ?)

That is what the plaintiff must assert. The infringement here complained of was the use of carbon and manganese with the steel, in such manner as to produce carburet *of manganese in the process, the patent being for the application of carburet of manganese to steel. Assuming that to be an infringement of the patent, it follows that any one using the same process had anticipated the patent: and it was shown that five firms had done so, of which at least three had done it without any kind of concealment. It is true that, where the previous alleged user turns out to have been merely experimental, that is not a previous user sufficient to vitiate the patent. But, if the discovery has been actually used in trade, the patentee cannot be the first inventor: *Tennant's case* (1), where the party previously using the method had kept it secret from all but his two partners and two servants concerned in preparing it;

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(1) Abstracted in *Davies's Collection of the most important cases respecting Patents of Invention*, 429.

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Carpenter v. Smith (1), where Lord ABINGER distinguished from the case of mere experiments, and added: "The 'public use and exercise' of an invention means a use and exercise *in public*, not *by the public*." In *Morgan v. Seaward* (2), which may be cited on the other side, there was, so far as regarded this realm, no more than a secret experiment, or at any rate a secret construction of the article, though with a view to user abroad; and the actual user took place after the date of the plaintiff's patent. * * The distinction is not between user of a method for the purposes of the trade of the party using and public announcement of the method, but between an experiment not reduced to practice and actual practice.

(LORD CAMPBELL, Ch. J.: When I was *Attorney-General*, and it appeared that there were two contemporaneous discoverers, I used to give a patent to the two jointly.

Sir A. J. E. Cockburn, *Attorney-General*, stated that he had adopted the same practice, but had found parties ordinarily unwilling to accept patents on such terms.)

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No doubt there would be much hardship if a patent were defeated by proof of an earlier experiment which had been abandoned: but that is not the case here. A fair criterion of the rights of these parties is this: Would the plaintiff be able to sue any party for now doing what that same party had done lawfully before the patent? In *Cornish v. Keene* (3) TINDAL, Ch. J. says: "If the defendants have shown that they practised it and produced the same result in their factory before the time the patent was obtained, they cannot be prevented by the subsequent patent from going on with that which they have done." The Judge in the present case had really nothing to leave to the jury: if he had asked them to say whether there had been a public user, he must have defined to them a public user; and that would have brought him to the words of the statute; which would, in effect, have been directing them to find for the defendant, the evidence not being *impeached. A decision for the plaintiff would reintroduce the very evil which stat. 21 Jac. I. c. 3, as is known from history and as appears by the preamble, was intended to prevent; for it would confer a power of granting a monopoly against parties already in the enjoyment of the trade.

(1) 60 R. R. 736 (9 M. & W. 300;
S. C. at N.P., 1 Webster's Pat. Ca.
530; see p. 534).

(2) 46 R. R. 700 (2 M. & W. 544).
(3) 43 R. R. 747 (1 Webster's Pat.
Ca. 511).

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The patent laws, no doubt, have in view the publication of discoveries: but this they require as the consideration for the enjoyment of a monopoly, not as a condition for putting in practice a discovery of which others, if they can, may also avail themselves; which is all that the parties previously practising have here done. In *The Househill Company v. Neilson* (1) Lord LYNDHURST, L. C. said: "If the invention is in use at the time that the grant is granted, the man cannot have a patent, although he is the original inventor." The Court of Common Pleas relied upon this language in *Stead v. Williams* (2).

Sir A. J. E. Cockburn, Attorney-General, and T. Webster, contra:

The use which is to invalidate a subsequent patent must be more than use for the mere purpose of the party using: it must be, in some sense of the word, public.

(LORD CAMPBELL, Ch. J.: Is not that Judge-made law? Must we not look at the language of the statute?)

Of the statute as judicially expounded. It is important to distinguish between two sorts of inventions: in one, the article itself, on being inspected, discloses the nature of the invention; in the other, the article shows nothing but the result produced.

(LORD CAMPBELL, Ch. J.: The lock, in *Carpenter v. Smith* (3), you would probably instance as a case of the former sort.) [*265]

It is so: chemical inventions are of the latter sort: and, of these, some are such that analysis will detect the method, as where the peculiarity is merely as to the simple substance used; some, as where the mode of treating or obtaining such substances constitutes the invention, are beyond the reach of analysis. The general sale of articles produced by processes of the second kind will not furnish the public with the means of becoming acquainted with the nature of the invention. The present case obviously is one of the latter sort of inventions. Neither is an open use of the process in a private manufactory a disclosure of it to the public. The patent laws have in view two objects: first, to stimulate invention; secondly, to secure to the public the knowledge of the invention.

(1) 57 R. R. 162 (in Dom. Proc.; 842).

1 Webster's Pat. Ca. 673, 719; S. C. (3) 60 R. R. 736 (9 M. & W. 300; 9 Cl. & Fin. 788; see p. 807). S. C. at N. P., 1 Webster's Pat. Ca.

(2) 66 R. R. 797 (7 Man. & G. 818, 530).

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(LORD CAMPBELL, Ch. J.: Thirdly, to protect persons in trade from being interfered with by a monopoly.)

The policy is to be inferred from a view of the balance of advantage and disadvantage. The patentee here has promoted the policy in all respects: the earlier practisers of the invention have attended merely to their own interests. Their user no more prevents the present patent from being valid than Dr. Hall's invention invalidated Dollond's patent (1). *Morgan v. Seaward* (2) is a similar case.

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Here five firms appear as independent *discoverers: the case would be different if they all obtained their knowledge from a common source, for then that common source would be public: but each conceals from the public.

(LORD CAMPBELL, Ch. J.: As to three of the firms, there is no concealment beyond the fact of no positive steps being taken to produce publicity.)

The effect is the same. The plaintiff was an inventor; and he is the first inventor who published. The case falls within the principle of *Jones v. Pearce* (3), *Lewis v. Marling* (4) and *Morgan v. Seaward* (2). It is not necessary to inquire whether the parties who actually practised this invention before might specially plead the fact: that may possibly result from the doctrine intimated in the *dictum* cited from *Cornish v. Keene* (5). Here the question is what protection such prior user gives to a third party who does not use till after the publication made by the patent. The monopoly is a reward for the publication. * * If the previous user stopped at mere experi-

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(1) "The objection to Dollond's patent was, that he was not the inventor of the new method of making object glasses, but that Dr. Hall had made the same discovery before him. But it was holden, that as Dr. Hall had confined it to his closet, and the public were not acquainted with it, Dollond was to be considered as the inventor of it." Per BULLER, J., in *Boulton v. Bull*, 3 R. R. 439 (2 H. Bl.

463, 470).

(2) 46 R. R. 700 (2 M. & W. 544).

(3) 1 Webster's Pat. Ca. 122.

(4) 34 R. R. 313 (10 B. & C. 22).

(5) 43 R. R. 747 (1 Webster's Pat. Ca. 511).

(6) 1 Webster's Pat. Ca. 521, 525.

(7) 82 R. R. 691 (5 Ex. 331). See *Smith v. London and North Western Railway Company*, 95 R. R. 435 (2 E.L. & B.L. 69).

(LORD CAMPBELL, Ch. J.: Yes, if that part be new.)

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* * *Tennant's case*(1) (which was recognised in *Hill v. Thompson*(2)) is relied upon on the other side; but, when that case is compared with *Cornish v. Keene* (3) and *Dollond's case* (4), it appears that a party, who has not himself used an invention before the patent, cannot assert that a patent is void on the ground of a previous secret use by others. A fuller report of *Tennant's case* than that given by Davies was published about the time (5); and from that it appears that Tennant learned the method from another party, and that the method had been practised by several persons. In *Wood v. Zimmer* (6) GIBBS, Ch. J. left it to the jury "whether the invention was in public sale before the patent." *Carpenter v. Smith* (7) is cited: but from the report of the trial it appears that the invention was, before the patent, publicly known, and the article made by several distinct parties. In *Househill Coal and Iron Company v. Neilson* (8) Lord CAMPBELL insists upon the "prior use publicly known;" and Lord LYNTHURST, L. C. (9) carefully excludes the supposition that the House of Lords had "given any decision upon this state of facts, namely, if an invention had been formerly used and abandoned many years ago, and the whole thing had been lost sight of." In *Stead v. Williams* (10) the principle laid down was that the public "cannot be *precluded from the right of using such information as they were already possessed of, at the time of the patent granted;" and that the proper question was whether "there had been such a publication as to make the description a part of the public stock of information." In the case of *Soames's Patent* (11), before the Privy Council, Lord CAMPBELL said: "when sitting in a court of justice, and considering the validity of the patent, I should require that it should be known in England."

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(LORD CAMPBELL, Ch. J.: Our law in that respect differs from that of some other countries, where the publication out of the realm is understood to destroy the novelty: and I, as a legislator, was

(1) Davies's Collection, &c. 429.

(2) 20 R. R. 488 (8 Taunt. 375).

(3) 43 R. R. 747 (1 Webster's Pat. Ca. 501).

(4) 3 R. R. 439 (2 H. Bl. 470).

(5) "Proceedings in a Suit in Chancery, and the Trial of a Cause instituted in the Court of King's Bench, "in the name of Mr. Charles

Tennant," "against Messrs. James Slater," &c. Manchester, 1803.

(6) 17 R. R. 605 (Holt's N. P. C. 58).

(7) 60 R. R. 736 (9 M. & W. 300).

(8) 57 R. R. 162 (9 Cl. & Fin. 814).

(9) 57 R. R. 162 (9 Cl. & Fin. 816).

(10) 66 R. R. 797 (7 Man. & G. 843).

(11) 1 Webster's Pat. Ca. 729, 733.

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anxious that the law should be so in England : but a different view prevailed.)

LORD CAMPBELL, Ch. J. :

I am of opinion that this rule should be discharged. We must assume that the evidence for the defendant is true : and it seems to me that, giving credit to it, the patent is invalid. We are not so much to attend to the particular words of the plea, as to consider whether the patent can be maintained in conformity with stat. 21 Jac. I. c. 3, s. 6, and the decisions that have been pronounced upon that statute. I am of opinion here that, if the jury had found for the plaintiff on this plea, the verdict could not have *been supported. We must now assume that, before the date of the patent, there were at least five firms using the process substantially in the manner described in the specification of the patent. That process, according to the decision of the Exchequer Chamber in *Heath v. Unwin* (1), consisted in making steel by applying a combination of carbon and manganese producing carburet of manganese : and it is clear that these five firms had all manufactured the steel by putting into a crucible iron, manganese and carbon, and thus making carburet of manganese. This was not a mere experiment : a perfect manufactured article was produced for profit, by hundreds of tons. As to two of these firms, it appeared that they did not disclose the nature of the method : but the other three firms made no attempt at concealment, but carried on the trade just like any other handicraft by which bread was to be earned ; all the workmen and other persons successively employed knew of the method. That being so, the question is whether, under these circumstances, the patent can be supported. Now look at the statute, the passing of which, we all know, was a great achievement on behalf of the liberty of the subject, as it put an end to the mischief of monopolies, and enabled persons who had been earning their bread to continue to do so by the same means, without a liability to legal proceedings. The statute, when it put an end to the monopoly, reserved the power of granting letters patent for " new manufactures," with these most important words, " which others at the time of making such letters patents and grants shall not use." Now can it be said that at the time when this patent was granted others did *not use this manufacture ? The five firms all did use it, in the way of trade, earning their bread by it. Can it be said that in that state of things the Crown was authorized to grant

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this patent? We might as well revive Sir Giles Mompesson's patent, and all the other monopolies which reflected so much discredit on the policy of this country. But it is said that, according to judicial determinations, the user must be public. If we are to make this addition to the statute, has there not been a public user within the meaning of the words? Can a patent be granted for a manufacture which other people have used, not indeed in the market place, but without any concealment whatever? If this user without concealment does not constitute a public use, what does? Then, as to the decisions. In *Jones v. Pearce* (1) there was a mere experiment: in *Lewis v. Marling* (2) a model and specification had been shown; but no machine used: in *Morgan v. Seaward* (3) the machine was privately made to be sent abroad. Does any one of these cases approach the present, where, during several years, the manufacture has been carried on for the purpose of trade, and the article sold to the public? Therefore I think this patent void, as being contrary to the condition on which patents are granted, there being no authority to support it, and *Carpenter v. Smith* (4), with other decisions, being adverse to it. Then what purpose could be served by the *Attorney-General* going to the jury on anything but the credit of the witnesses? No doubt, if, as in *Jones v. Pearce* (1), there had been anything in the evidence indicating that the user was a mere experiment, that might have been put to the jury: *that question I generally leave to them. But here the evidence was all one way; and, if the witnesses were believed, the jury were bound to say that there had been a previous user, and not an abandoned experiment as in *Jones v. Pearce* (1). Looking, therefore, at the evidence, the statute, and the authorities, I think the jury were bound to find for the defendant; and that the verdict cannot be set aside.

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ERLE, J. (5):

I also am of opinion that this rule should be discharged. The steel, as I understood, was manufactured by the defendant from carbon, manganese and iron: and, it having been discovered that the combination of these will produce carburet of manganese, it was held in the Exchequer Chamber (6), and I held at the trial, that the patent comprehended all use of carbon, manganese and iron. Upon

(1) 1 Webster's Pat. Ca. 122.

(2) 34 R. R. 313 (10 B. & C. 22).

(3) 46 R. R. 700 (2 M. & W. 544).

(4) 60 R. R. 736 (9 M. & W. 300).

(5) Wightman, J. had left the Court during the argument.

(6) *Heath v. Unwin*, 12 C. B. 522.

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that point, the question for the opinion of the jury may be, whether the melting these in combination produced carburet of manganese : the plaintiff as patentee did not rely upon any given proportions. Then the evidence as to the question of novelty I may take to be, that five extensive firms had used the method for profit, some to the extent of one hundred tons yearly, some to the extent of eight or ten ; and I must be taken to have laid down the law, that, if there was such user before the patent was taken out, the patented invention could not be novel. By that, as at present advised, I still abide. The notion of these being mere experiments is completely contrary to the evidence : and the parties produced the article in as perfect a state as the patenting process itself did. As to secrecy, three of the firms practised no concealment whatever. That of itself is ground enough for discharging the rule. I should, however, be disposed to go further. If one party only had used the process, and had brought out the article for profit, and kept the method entirely secret, I am not prepared to say that then the patent would have been valid. But, for the purpose of the present case, it is enough to say that here was an user without any concealment.

LORD CAMPBELL, Ch. J. added :

I wish it to be clearly understood that, if we had held this patent valid, the five firms would all have been liable to an action for exercising the invention after the patent had been taken out. Nothing in the statute gives an exception in such a case. So that, if we had held a person entitled to a patent for the discovery of a process openly practised by others for their own profit, but without a public announcement of the method, the action would lie against them : there is no ground for contending that there is anything exempting such parties from liability. Now see what that comes to. If any man makes a discovery, and uses it without taking out a patent, and does not announce it by sound of trumpet or calling in the public as spectators, he must suspend the use of his discovery if another person subsequently makes the same discovery and takes out a patent for it. That would be the consequence of the principle for which the defendant is driven to contend.

Rule discharged

STANTON *v.* COLLIER (1).

(3 El. & Bl. 274—283; S. C. 23 L. J. Q. B. 116; 18 Jur. 650; 22 L. T. O. S. 240.)

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Count by a printer for not restoring a printing machine according to contract, whereby the trade of plaintiff had been ruined, and he had become insolvent. Plea; that, after the accruing of the causes of action, plaintiff took the benefit of the Insolvent Debtors' Act, and the causes of action vested in the provisional assignee. Demurrer; and further replication, that the assignee had not intervened; on which was a rejoinder, and a demurrer to the rejoinder:

Held, that stat. 15 & 16 Vict. c. 76, s. 142 (2), does not apply to actions commenced after the insolvency of the plaintiff; and that the non-interference of the assignees is immaterial where the cause of action accrues before the insolvency: and therefore the replication was not an answer to the plea.

Held, also, that the cause of action disclosed on this count, and the special damage there alleged, were wholly injury to the estate of the plaintiff, and not personal damage; and, consequently, that the whole cause of action passed to the assignee, and the plea was good (3).

COUNT. That plaintiff carried on the trade of a printer: that, the sheriff having seized goods of the now plaintiff under a *fi. fa.*, issued on a judgment against him at the suit of the now defendants, it was agreed between plaintiff and defendants that the sheriff should withdraw; that defendants should advance to plaintiff 50*l.*; that defendants should at their own expense take down and remove to their own premises a printing machine of plaintiff by way of security; and that, if, within fourteen days, plaintiff redeemed it by paying the advances, defendants should at their own expense put it up again on plaintiff's premises. Averment: that plaintiff within the fourteen days tendered the money. Breach: that defendants refused to accept the money or replace the machine: "Whereby the plaintiff not only lost and was deprived of great gains and profits which otherwise would have accrued to him by the use of the said printing machine in the way of his said trade or business, but also, by reason of the premises, the whole business and trade of the plaintiff hath been ruined, injured and stopped, and the plaintiff hath thereby become insolvent, and incurred very heavy costs and expenses."

Plea. That, after the accruing of the causes of action, plaintiff, being in actual custody, petitioned the Court for the Relief of Insolvent Debtors; and that, by a vesting order made by them, the causes of action vested in the provisional assignee.

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Demurrer. Joinder.

(1) *Cook v. Whellock* (1890) 24 Q. B. D. 659, 59 L. J. Q. B. 329, 62 L. T. 875.

(2) Repealed: S. L. R. 1875, 46 & 47 Vict. c. 49, s. 3.

(3) The principles of the decision appear to be still applicable under the existing Bankruptcy Acts.—W. B.

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Second replication to this plea : That the assignee has not **interfered** to claim the causes of action, or to prevent the plaintiff **from** suing for them.

Rejoinder : That the causes of action were wholly before plaintiff's petition ; that plaintiff filed a schedule, and was discharged **as to** the debts named in it, which are not yet satisfied.

Demurrer. Joinder.

Wordsworth, for the plaintiff :

* * The plea ought to show that the assignees have **interfered** to claim the cause of action : *Herbert v. Sayer* ⁽¹⁾, *Jackson v. Burnham* ⁽²⁾.

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(LORD CAMPBELL, Ch. J. : The doctrine acted on in these cases is applicable where the cause of action is one arising from dealings with the bankrupt or insolvent after the bankruptcy or insolvency. But, unless you can say something to change our opinion, we think that, when the *cause of action was already vested in the debtor at the time when by the order his property passed to the assignee, interference on the part of the assignees is wholly immaterial.)

The cause of action is not one which passes to the assignees at all. The principal damage is plaintiff's insolvency, a matter injurious to his personal feelings, and for which a jury might properly give vindictive damages. Such a cause of action does not pass : this was assumed in *Beckham v. Drake* ⁽³⁾, and decided in *Rogers v. Spence* ⁽⁴⁾.

(LORD CAMPBELL, Ch. J. : The distinction between the cases in which the cause of action passes to the assignees and those in which it does not is analogous to the question considered in *Blake v. Midland Railway Company* ⁽⁵⁾. A *solatium* for the injury done to the personal feelings of a debtor does not pass to his assignees ; damages for the injury to his property do.

COLERIDGE, J. : But in this case the breach is for not delivering property, so that the cause of action itself might be sued for by the assignees. And the assignees might, for aught I at present see,

(1) 5 Q. B. 965.

(2) 8 Ex. 173.

(3) 81 R. R. 301 (2 H. L. C. 579).

(4) 69 R. R. 169 (12 Cl. & Fin. 700), affirming the judgment of the Exchequer Chamber in *Rogers v. Spence*,

67 R. R. 736 (13 M. & W. 571), which affirmed the judgment of the Exchequer in *Spence v. Rogers*, 63 R. R. 575 (11 M. & W. 191).

(5) In Q. B. ; Feb. 21, 1852.

lay the special damage in precisely the same terms as is now done by the plaintiff; for it all points to a pecuniary loss.)

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The jury might give vindictive damages for the insolvency; that is the test laid down in *Brewer v. Deu* (1), the decision in which case goes further than the plaintiff now requires.

H. Bullar, contra, was desired by the COURT to confine himself to the point last made :

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The whole law on this subject was elaborately considered by the House of Lords in *Rogers v. Spence* (2) and *Beckham v. Drake* (3), in which latter case all the prior authorities were collected and reviewed. In a more recent case, *Wetherell v. Julius* (4), the Court of Common Pleas, after time taken to consider, stated the principles to be deduced from these cases. They say: "In the former" (*Rogers v. Spence* (2)), "it was held, that a cause of action arising out of a wrong personal to the insolvent, and for which he would be entitled to a remedy, whether his property were diminished or impaired or not, does not pass to the assignee." "On the other hand, in *Beckham v. Drake* (3), it was held, that, where pecuniary loss or damage is the substantial and primary cause of action, it does pass to the assignee, although such pecuniary loss may produce inconvenience to the party." Now in the present case there is but one cause of action, the non-delivery of the printing machine: no fresh cause of action would accrue on the happening of the special damage: *Howell v. Young* (5). That cause of action is as much a damage to the personal estate as the dishonouring of a bill of exchange; and an action for dishonouring a bill passes to the assignees: *Hill v. Smith* (6). The special damage to the plaintiff's trade is entirely a pecuniary damage: and, as to the insolvency, that is in general a grievous pecuniary damage. It is said that it is also a personal inconvenience to the plaintiff. Even if a *solatium* for that could be recovered, still the substantial cause of action is pecuniary; which brings this *case within *Beckham v. Drake* (3) as expounded in *Wetherell v. Julius* (7). But no damage can be recovered for the insolvency. In one sense, every thing which has diminished the plaintiff's property may be said to have caused his insolvency; but the damages recoverable for a breach of

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(1) 63 R. R. 690 (11 M. & W. 625).

(2) 69 R. R. 169 (12 CL. & Fin. 700).

(3) 81 R. R. 301 (2 H. L. C. 579).

(4) 84 R. R. 567 (10 C. B. 267, 280).

(5) 29 R. R. 237 (5 B. & C. 259).

(6) 67 R. R. 436 (12 M. & W. 618).

(7) 84 R. R. 567 (10 C. B. 267).

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contract are only those directly connected with the contract. * * *
Now, in this case, the damage sustained by not being able to use the machine may be recoverable; for that is *propter rem non habitam*; but that is a damage for which the assignees may sue. The insolvency of the plaintiff, and still more the injury to his feelings arising from that insolvency, is too remote. The parties cannot have contemplated that consequence when they made the contract. * * *

Wordsworth, in reply :

Brewer v. Dew (1) has not been distinguished from the present case.

LORD CAMPBELL, Ch. J. :

I am of opinion that the defendants are entitled to judgment. In the course of the argument we intimated a clear opinion that sect. 142 of the Common Law Procedure Act does not apply. Neither is there any objection to the plea, on the ground that it is not shown that the assignees have interfered and claimed the cause of action. The cases to which the doctrine alluded to is applicable are those in which the cause of action relates to property acquired after the insolvency. In the present case the property was in the plaintiff before the vesting order, by virtue of which all property then vested in him was transferred to his assignees; and, from that time, he could have no cause of action in respect of such property. But then comes the question, whether the cause of action disclosed on this record is such as would pass to the assignees. As to that, the rule to be deduced from *Rogers v. Spence* (2) and *Beckham v. Drake* (3) is that, where the cause of action and damage touch only the person of the debtor, they do not pass to the assignees; but, if they touch the personal estate, they do. Now, in the present case, the printing press had become, at the time the action commenced, the property of the assignees; the breach for not delivering it touches that property, and would be well assigned in an action by the assignees. The question therefore is confined to the effect of the special damage. Now, even supposing that, if a part of the special damage was personal, so much of the cause of action would not pass to the assignees; I am of opinion that the whole of the special damage here alleged, supposing it all to be

(1) 63 R. R. 690 (11 M. & W. 625).

(3) 81 R. R. 301 (2 H. L. C. 579).

(2) 69 R. R. 169 (12 Cl. & Fin. 700).

recoverable, is substantially damage to the personal estate, and there is no part which touches only the person. As my brother COLERIDGE said during the argument, I do not see why the assignees might not lay special damage in these terms as much as the plaintiff. It would have been quite a different thing if anything had been alleged confined entirely to the person, as in *Wetherell v. Julius* (1), where the damage, in the first count, was the imprisonment of the plaintiff.

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COLERIDGE, J.:

I am of the same opinion. There is but one cause of action here; the non-delivery of the printing press according to the contract. That would *entitle the plaintiff, if he had not become an insolvent, to recover damages for his pecuniary loss; and, if there was nothing shown to alter the case, the measure of those damages would be the value of the article. But here special damage is alleged. I do not think it necessary to consider whether the damage laid can be recovered or is too remote; for I agree with my Lord, that, supposing it could all be recovered to the full extent laid, everything here alleged is pecuniary damage affecting the estate.

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WIGHTMAN, J.:

It is clear that, where the action is for a cause happening before the bankruptcy or insolvency, it is not necessary, for the party pleading the bankruptcy or insolvency, to show that the assignees have interfered. As to the other point, the rule is clear, that *primâ facie* all causes of action relating in any way to the personal estate pass to the assignees; but that is subject to an exception where the personal estate is injured only through the injury to the person or personal feelings of the debtor. In the present case, the breach is for not delivering a printing press, a cause of action which would clearly pass. The special damage is averred to be that the plaintiff lost the "gains and profits which otherwise would have accrued to him by the use of the said printing machine," and his whole business has been "ruined, injured and stopped, and the plaintiff hath thereby become insolvent, and incurred very heavy costs and expenses." All this goes to show pecuniary damage to the personal estate, and not an injury to the person or feelings of the insolvent. As to the cases cited. *Brewer v. Dew* (2) was most relied upon; and it is the *strongest. But the reasons on which the judgment there was

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(1) 84 R. R. 567 (10 C. B. 267).

(2) 63 R. R. 690 (11 M. & W. 625).

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given make the case distinguishable; for that was an action for a wrong done to the plaintiff's immediate personal possession of goods; and the COURT proceeded on the ground that there was a wrong independent of any question of the value of goods or the right of property.

(No fourth Judge was present.)

Judgment for defendants.

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PENNEL v. ALEXANDER.

(3 EL. & BL. 283—306; S. C. 23 L. J. Q. B. 171; 18 Jur. 627; 22 L. T. O. S. 274.)

Defendants, merchants resident in Ireland, wrote to S. A., a merchant resident in London, authorizing him "to take for us two cargoes" of Ibraila corn 1,000 to 1,500 quarters at 24s. to 24s. 3d., "payment by our acceptance at 2 or 3 months," and in postscript added, "You may go to 24s. 6d., if you find you cannot do the work at 24s. or 3d." S. A. made a bargain with R., a merchant resident in London, for a cargo by the C., and sent him a note commencing "Sold by order and for account of R. to our principals the cargo" of Bulgarian corn per C. at 24s. 6d. per quarter, cost, freight and insurance, "Sellers to pay a commission of two per cent. Payment in cash" in one week after receipt of documents. On the same day R. in his books debited S. A. with the price of the cargo, and sent S. A. the shipping documents with the bill of lading indorsed, and an invoice headed "S. A. bought of R." On the same day, S. A. wrote to defendants "to advise having purchased for your account the cargo of Bulgarian corn per C., at 24s. 9d. per qur. C. F. and I., which is 3d. per quarter over your limit for Ibraila, but proportionately cheaper." In this letter were enclosed the shipping documents of the C. (including the indorsed bill of lading), and an invoice headed "Invoice of a cargo, &c. bought by order and for account and risk" of defendants; and a draft for the price at 24s. 9d., drawn by S. A. on defendants. Defendants returned the draft accepted, stating in the letter, "We note purchase of corn per C. at 24s. 9d. We would much rather have had Ibraila at 24s. or 24s. 3d." After this, whilst the bill was still current, and before the arrival of the C., S. A. failed. R. stopped the cargo of the C., treating S. A. as the purchaser, and claiming to be an unpaid vendor to him. Defendants, on receiving an indemnity from R. against the bill, paid him the price less discount, at the rate of 24s. 6d., being less than the sum for which the bill was accepted, which was at the rate of 24s. 9d.

The assignees of S. A., who had become bankrupt, sued defendants on the bill. R. defended the action for them, on the ground that the consideration for the bill had failed. A case was stated for this Court, in which the correspondence, containing as above stated, was set out, and the Court had power to draw inferences of fact:

Held, that on the above documents it must be taken that, notwithstanding the form of the contract note and of the defendants' order to S. A., the transaction was a sale from R. to S. A. and a sale from S. A. to defendants, and not a sale from R. to defendants through S. A. And this, without reference to the fact that defendants resided in Ireland.

Held also that, the indorsed bill of lading being assigned to defendants

for value, R. had no right to stop *in transitu*; that consequently the payment of R. by defendants was in their own wrong; and that the consideration for the bill of exchange had not failed, and the plaintiffs were entitled to judgment.

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ACTION on a bill of exchange for 1,525*l.* 16*s.* 3*d.*, dated 3rd September, 1851, drawn by Ashlin before *his bankruptcy on defendants, three months after date, accepted by defendants, and now overdue; and for goods bargained and sold, and goods sold and delivered, by Ashlin before his bankruptcy; and on accounts stated with Ashlin before his bankruptcy; and on accounts stated with his assignees since.

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The only material plea was the following. Plea 4 to first count. That Ashlin had been employed as agent and factor for defendants to purchase corn for them, and had, as such agent, bought a cargo of Indian corn from one Antonio Ralli for and on account of defendants: Averment that Ashlin drew, and defendants accepted, the bill, "and then delivered the same to the said Spencer Ashlin (1) (for the special purpose only of the said Spencer Ashlin indorsing and delivering the said bill to the said A. Ralli) for and on account and in payment of the said Indian corn on behalf of the defendants;" that Ashlin did not indorse or deliver the bill to Ralli; "but (1) (, in violation of and contrary to the terms and purpose on which he so took and held the said bill as aforesaid (1),) kept and retained the said bill in his the said Spencer Ashlin's own possession (1) (*until and at the time of his bankruptcy*)." Further averments that there was no other consideration or value for the bill than as aforesaid; and that Ralli, before the commencement of the action, obliged the *defendants to pay for the cargo. Replication: *De injuriâ*. Issue thereon.

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To the rest of the declaration, *Nunquam indebitatus*. Issue on these pleas.

On the trial, before Lord Campbell, Ch. J., at the Guildhall sittings after Hilary Term, 1853, a verdict was found for the plaintiffs, subject to a case, of which the material parts were as follows.

The plaintiffs in this action are the assignees of the estate and effects of Spencer Ashlin, who was duly declared a bankrupt on 15th November, 1851. He stopped payment on 13th September, 1851.

The defendants for some years last past have been residing and carrying on business as merchants at Londonderry in Ireland.

(1) The plea was during the argument amended by striking out the two passages above printed between (), and by inserting the averment above printed in italics between (): see *post*, p. 482.

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Antonio Ralli, hereafter referred to, has for some years last past been residing, and carrying on business as a corn and general merchant, in London, under the firm of A. Ralli & Co.

The first transaction of A. Ralli & Co. with the bankrupt was in August, 1850; and was similar to the transaction, hereinafter mentioned, as to the cargo of the *Cleopatra*: and after that time there were many other precisely similar transactions, amounting in the whole to upwards of 80,000*l*. In every instance entries were made in A. Ralli's books similar to the invoice of 3rd September, 1851, first hereinafter mentioned. A. Ralli was paid by the bankrupt shortly after the respective transactions according to the credit given, except in certain cases in which the bankrupt paid prior to the expiration of credit, taking interest for the unexpired period of credit. Previously to the transaction as to the **Cleopatra's* cargo, the bankrupt had only one transaction with defendants.

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The case then set out several letters between the bankrupt under his firm of Spencer Ashlin & Co. and defendants under their firm of J. R. and J. Alexander; of which the material parts are here extracted.

J. R. and J. Alexander to Spencer Ashlin & Co., 28th August, 1851. "You may take for us two cargoes of Ibraila corn, 1,000 to 1,500 quarters, at 24/ or 24/3 per imperial quarter; bills of lading dated in July or August; payment by our acceptance at 2 or 3 months. One cargo of Ibraila, at same price, arrived, or near at hand, from 10 to 1,200 quarters; respectable shippers; for the latter we will remit cash." "P.S. You may go to 24/6 if you find you cannot do the work at 24/ or 3*d*."

Spencer Ashlin & Co. to J. R. and J. Alexander, 30th August, 1851, "We have your favour of the 28th instant, and obliged by your orders. Beg leave to inform you that we have taken for your account a cargo of Indian corn per the *Sultan*; 529 kilos. nearly 1,200 quarters, from Ibraila at 24/6 per quarter. C. F. and Insurance. Bill of lading dated 30th July. On Monday we shall wait upon you with documents, and do what we can for you in further purchases."

J. R. and J. Alexander to Spencer Ashlin & Co., 1st September, 1851. "Your esteemed favour of the 30th is to hand, and note contents, which are satisfactory. You can keep the balance of our order in hand during the week."

Spencer Ashlin & Co. to J. R. and J. Alexander, 1st September, 1851. "Herewith we beg to hand you documents and invoices p. *Sultan*:" "to your debit 938*l*. 13*s*. 0*d*. : against which we have valued

upon you from date of *invoice, say July 29th, at 3 months' date, which balances the transaction; and we shall be obliged by your acceptance of our draft and returning the same to us. We have been unable to purchase anything more to-day in execution of your order, our market being stiffer for Ibraila corn; but you may rely on our best exertions."

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J. R. and J. Alexander to Spencer Ashlin & Co., 3rd September, 1851. "Your esteemed favour of the 1st is to hand; documents of *Sultan* inclosed. We now beg to wait upon you with acceptance to your draft, and note you keep balance of our order in hand."

The case then proceeded. On 3rd September, 1851, the following contract note was signed by the bankrupt, and sent by him to Messrs. A. Ralli & Co.

"LONDON, 3rd September, 1851.

"Sold by order and for account of Messrs. Antonio Ralli & Co. To our principals. The cargo of Bulgarian Indian corn, fair average quality, shipped p. *Cleopatra* Captain A. Saliaris, from Ghiacetti, consisting of 14,000 kilos, as per bill of lading dated 10th July, 1851, at the price of 24/6 say twenty-four shillings and sixpence per quarter, free on board at Ghiacetti, including freight and insurance to any safe port in the United Kingdom of Great Britain and Ireland, calling at Queenstown or Cork or Falmouth for orders; reckoning 816 kilos equal to 100 quarters; no charge for damage. Sellers to pay a commission of two per cent.; payment to be made in cash, less discount for the unexpired time of three months from the date of the bill of lading, in one week after receipt of documents and policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible, except the insurance is effected abroad; and in the latter case the loss or average, if any, is guaranteed to be adjusted and *paid according to the custom and insurance of Lloyd's. In case of any dispute, it is agreed by buyers and sellers to leave the same to two London corn factors, mutually chosen, or their umpire, and to be bound by their decision. SPENCER ASHLIN & Co."

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This was a lithographed form, which the bankrupt was in the habit of using. The cargo of the *Cleopatra* belonged to A. Ralli; and the following entry was made in A. Ralli's books respecting the said sale of the said corn p. *Cleopatra*. "London, Sept. 4th, 1851. Messrs. S. Ashlin & Co. Drs. to the cargo of I. corn per *Cleopatra*" (here follows the same as in the invoice after mentioned from the words "per *Cleopatra*").

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The case then set out the following letter from A. Ralli & Co. to Spencer Ashlin & Co., of 3rd September, 1851. "We herewith enclose the shipping documents for the cargo of I. corn p. *Cleopatra*, together with letter of guarantee for the insurance, and an order for the captain to follow your instructions. We also forward the invoice, and trust you will find everything correct."

The shipping documents above referred to were in the usual form, and included the charter-party and the bill of lading, the latter of which was duly indorsed by A. Ralli. The following is a copy of the invoice inclosed in the said letter.

"Messrs. S. ASHLIN & Co. LONDON, September 3rd, 1851.

Bought of A. Ralli & Co.

The cargo of Indian corn per *Cleopatra* Captain Saliaris @ Ghiacetti, as per bill of lading dated 10th July,

14,000 kilos. I. corn at 816^{kos.} per 100 qrs.,

equal to 1,715½ quarters, at 24/6 per

quarter C. F. and I. £2,101 12 10

Charges.

Freight on 1,715½ quarters at

9/8 per quarter £793 9 6

Gratuity 15 0 0

808 9 6

Advance to captain @ Ghiacetti 200 0 0

608 9 6

1,493 3 4

Commission 2 p. cent. 42 0 8

"E. E. A. R. & Co.

£1,451 2 8"

The case then set out several letters, of which the following are the material parts.

A. Ralli & Co. to Captain Saliaris, 3rd September, 1851. "You will please follow the instructions of Messrs. Spencer Ashlin & Co. (or their agent) respecting your port of discharge, receiving the amount of your freight from your consignees, and without further reference to ourselves."

Spencer Ashlin & Co. to J. R. and J. Alexander, 3rd September, 1851. "Your esteemed favour of the 1st instant is duly to hand; and we now beg to advise having purchased for your account the cargo of Bulgarian Indian corn p. *Cleopatra* at 24s. 9d. p. quarter

C. F. and I., which is 3*d.* per quarter over your limit for Ibraila, but is proportionately cheaper. We at the same time are able to enclose you documents, viz. bill of lading, charter-party, the order letter to the captain, letter of guarantee for the insurance, invoice amounting to 1,525*l.* 16*s.* 3*d.*, and our draft for this sum at 3 months' *date, which please return to us, in due course of post, completed with your acceptance."

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"P.S. We expect this cargo will realise 60/ 61 lbs.

"A. Ralli & Co. is one of our best sellers."

The following is a copy of the invoice referred to in the said letter from the bankrupt to the defendants of the 3rd September, 1851. "Invoice of a cargo of Bulgarian Indian corn shipped on board the *Cleopatra*, Captain Saliaris, p. bill of lading dated 10th July, 1851; bought by order and for account and risk of Messrs. J. R. and J. Alexander.

"1851. 14,000 kilos. 816 . . .	100 qrs.			
1,715½ quarters @ 24/9 . . .			£2,123	1 9
less freight @ 9/3	793	9	6	
Gratuity	15	0	0	
	808	9	6	
Advance at Ghiacetti	200	0	0	
			608	9 6
			1,514	12 3
Difference 54 days' interest			11	4 0
"E. E. LONDON, September 3rd, 1851.			£1,525	16 3

(Signed) "SPENCER ASHLIN & Co."

Spencer Ashlin & Co. to J. R. and J. Alexander, 5th September, 1851. "We have your esteemed favour of the 3rd instant, handing us your acceptance against the *Sultan* cargo, for which we are obliged. Please make our draft against *Cleopatra*, sent you last Monday, payable at a banker's, as this is sometimes looked to and facilitates our discounting the bill."

J. R. and J. Alexander to Spencer Ashlin & Co., 6th September, 1851. "Your esteemed favour of the 3rd, and note purchase of corn p. *Cleopatra* @ 24/9. We would much rather have had Ibraila @ 24/ or 24/3. We enclose draft accepted; and, as we have advice to-day of two cargoes of Ibraila bought for us by our Liverpool

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agent @ 24/, you need not operate further at present on our account till you hear from us."

The draft referred to in this letter is the bill upon which this action is brought.

J. R. and J. Alexander to Spencer Ashlin & Co., 8th September, 1851. "Your esteemed favour of the 5th is to hand, and shall in future attend to your wishes in respect of the draft, as it is all one to us, the only difference being it costs $\frac{3}{4}$ th per cent. to retire at a private office and $\frac{1}{4}$ th per cent. at a banker's. When you can come in at 28/3 to 28/6 or 9d. for Ibraila, we may give you another order."

The case then set out a letter of 10th September, 1851, from defendants to Alexander Lashbrooke, who was their agent at Falmouth, requesting him to order the *Cleopatra*, on arrival, to Londonderry; and a letter of 18th of September from Lashbrooke to the captain, so ordering him accordingly; which letter the captain received on arrival; and other letters of which the following were the material parts.

Spencer Ashlin & Co. to J. R. and J. Alexander, 8th October, 1851. "We regret to find that the sellers of the *Cleopatra's* cargo of Indian corn, Messrs. Ralli & Co., stopped the cargo at Falmouth. We have just had an interview with the lawyer, Mr. Maynard, and Mr. Quilter, the accountant to our estate, who agree that the cargo should be allowed to go on, provided you will discount *your own acceptance for it; 1,525*l.* 16*s.* 8*d.*, due on the 6th December. It is this peculiar position of our estate that compels them to make this request. Now we should strongly recommend you to do this at once, as you may have great difficulty to get the cargo otherwise, and be ultimately compelled to pay your acceptance. We suggest that you should send the amount of the bill to your own agents to be paid on the bill being given up in exchange, and the cargo ordered on to Londonderry."

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J. R. and J. Alexander to Lashbrooke, 11th October, 1851. "Your favour is to hand; and we have to-day written Messrs. Ralli & Co. regarding the detention of the *Cleopatra*. We hold the bill of lading indorsed by Ralli & Co.; but we understand they have some dispute with the original purchasers of the cargo."

J. R. and J. Alexander to A. Ralli & Co., 11th October, 1851. "We are to-day in receipt of a letter from Spencer Ashlin & Co., from whom we bought the cargo of corn per *Cleopatra*, saying that you had stopped the above cargo at Falmouth. We are rather surprised that you should have taken this step, which we are aware

you have no right to do; but from the peculiar position of Messrs. Spencer Ashlin & Co.'s estate we are inclined to waive our right, and to meet your views by taking up our acceptance, due on the 6th December. If you wish us to do so please write us in course; and in the meantime you can allow the captain of the *Cleopatra* to proceed to this port."

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J. R. and J. Alexander to Spencer Ashlin & Co., 11th October, 1851. "Your letter of the 8th to hand, and are rather surprised at its contents. We are informed that Messrs. Ralli & Co. have no right to stop the cargo: however, under the peculiar circumstances of your situation, *we are inclined to meet their views, and have written to them by this post regarding the matter."

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A. Ralli & Co. to Captain Saliaris of the *Cleopatra*, 18th October, 1851. "We are in receipt of your favours of the 25th and 28th ultimo; from the last of which we see there has been presented to you an order to proceed to Londonderry, for discharge; and in answer we beg to repeat the same that we have written you previously through Messrs. Fox & Co. of your place, *videlicet*, that you are not to follow the instructions of any one, but to stay there, and wait till you receive further orders, and this on account of the bankruptcy of your cargo's buyer, with whom we are in negotiations."

A. Ralli & Co. to J. R. and J. Alexander, 18th October, 1851. "In reply to your favour of the 11th instant, we are advised by our solicitors, Messrs. Crowder and Maynard, who are well known here that we have perfect right to stop the cargo of the *Cleopatra in transitu*: but, in the event of your desiring the vessel to proceed to your port, we will order the captain to do so, provided you will remit to us the amount of your acceptance due on the 6th December: that acceptance is now in the hands of Messrs. Spencer Ashlin & Co., who have stopped payment, and of which you are already aware; and they have neither handed over the said acceptance to us, nor paid us the amount of the same; and consequently we still have a lien on the cargo. Awaiting your early reply."

A letter of indemnity was given by A. Ralli & Co. to the defendants, on 21st October, 1851, which was set out in the case. The following are the material parts. "To Messrs. Jacob Robert and Josias Alexander, Londonderry. Gentlemen,—You having purchased a cargo of Indian *corn by the *Cleopatra*, and having given to Messrs. Spencer Ashlin & Co. your acceptance, due 6th December, 1851, for the amount including interest, *videlicet*,

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PENNELL 1,525*l.* 16*s.* 8*d.*, in exchange for the bill of lading of the said cargo
ALEXANDER. and the charter-party then delivered to you, and Messrs. Spencer Ashlin & Co. having become insolvent, without having paid us for the said cargo, we did on the arrival of the vessel at Falmouth stop the delivery of the cargo and countermand the orders you had given for the vessel to proceed with her cargo to Londonderry. It has now been agreed between you and us, the undersigned, that, in consideration of your paying to us the sum of 1,472*l.* 3*s.*, being the amount to which the cargo was invoiced by us to Spencer Ashlin & Co., less the guarantee commission of one per cent. agreed by us to be allowed to them, the said vessel with her cargo shall at once be allowed to proceed to her destined port agreeably to your orders, and that we, the undersigned, agree to indemnify you as hereinafter contained, and shall procure the additional guarantee of Messrs. Ralli Brothers of this city." Then followed a promise to indemnify against the acceptance. The case then set out a letter of indemnity from Ralli Brothers. Upon the above indemnities being given to them, the defendants paid A. Ralli 1,472*l.* 3*s.* The cargo of corn per *Cleopatra* was then delivered to the defendants, in pursuance of orders from A. Ralli, before the commencement of this action.

The Court are to be at liberty to draw inferences of fact. The Court are to have the same powers as a Judge at Nisi Prius has.

[*295] The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover in this action. And *the verdict is to be entered according to the direction of the Court.

Among the plaintiffs' written points for argument, one was: "That the action is undefended as to the sum of 74*l.* 13*s.* 7*d.*, the difference between the amount of the sale from Ralli & Co. to the bankrupt, and the amount of the sale from the bankrupt to the defendants, or, at all events, as to the sum of 53*l.* 13*s.* 3*d.*, the difference between the amount of the sale from the bankrupt to the defendants and the amount paid by them to Ralli & Co."

Amongst the defendants' written points for argument, one was: "That the fraudulent act of the bankrupt in stating to the defendants in his letter of advice that he had purchased the cargo for them at 3*d.* a quarter more than the price mentioned in the contract note will not make the transaction a sale by him to them, or entitle the plaintiffs, as his assignees, to recover the amount of the acceptance, or the 3*d.* per quarter."

The case was now argued (1).

(1) Before Lord Campbell, Ch. J., Coleridge and Wightman, JJ.

Bramwell, for the plaintiffs :

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The substantial question is, Whether A. Ralli, who defends this action, is to be a creditor on Ashlin's estate for the price of the *Cleopatra's* cargo, taking the same dividend as the other creditors, or is to be paid in full. There is no doubt that the defendants, J. R. and J. Alexander, are liable to pay somebody for the cargo ; the question is whether they are to pay A. Ralli direct, or to pay the assignees of Ashlin the amount of the draft which they had accepted before the bankruptcy, leaving A. Ralli to prove as a creditor. That depends entirely on the construction which this *Court will put upon the mercantile documents. These leave it a question, whether the sale was by A. Ralli & Co. to Spencer Ashlin & Co., and then a subsequent sale by Spencer Ashlin & Co. to J. R. and J. Alexander, so that Spencer Ashlin & Co. stood in the relation of purchaser to A. Ralli & Co. and of vendor to J. R. and J. Alexander ; or whether it was a sale by A. Ralli & Co. to J. R. and J. Alexander through Spencer Ashlin & Co. as an agent. Which-ever be the case, stoppage *in transitu*, on which A. Ralli & Co. and J. R. and J. Alexander at first rested their case, is out of the question. On the first supposition, that J. R. and J. Alexander were the vendees, the vendees have not failed ; and stoppage *in transitu* is a right which arises only on the failure of the vendee : *Wilmshurst v. Bowker* (1). On the second supposition, that Spencer Ashlin & Co. was the vendee, he has failed, and A. Ralli & Co. had a *prima facie* right to stop *in transitu* ; but, before it was exercised, the bill of lading had been *bonâ fide* transferred to J. R. and J. Alexander, for value ; and that put an end to the right : *Lickbarrow v. Mason* (2). In either point of view, therefore, the stoppage in October, 1851, was wrongful : J. R. and J. Alexander might, at that time, have maintained trover or detinue for the cargo ; and the payment by them to A. Ralli & Co. to get the cargo was in their own wrong. When it is thus understood, the case comes to be, that J. R. and J. Alexander have, without any authority express or implied by law, paid to A. Ralli a debt owing to him from Spencer Ashlin & Co., and cannot now set off that payment against their own debt to that *firm. The defendants now say that the sale was from A. Ralli & Co. to J. R. and J. Alexander, who still remained debtors to A. Ralli, notwithstanding that the draft had been accepted ; and that, in some way or other, the consideration for accepting the draft has failed. But the conduct of A. Ralli & Co. and J. R. and J. Alexander

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(1) 66 R. R. 806 (7 Man. & G. 882).

(2) 1 R. R. 425 (2 T. R. 63).

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at the time of the attempted stoppage is strong evidence that the transaction really was one of sale by A. Ralli & Co. to Spencer Ashlin & Co. J. R. and J. Alexander, in their letter to their Falmouth agent, on 11th October, say: "We hold the bill of lading endorsed by Ralli & Co.; but we understand they have some dispute with the original purchasers of the cargo." And A. Ralli & Co. writing to the captain to stop the cargo, say it is "on account of the bankruptcy of your cargo's buyer." This shows that the parties, who knew best, both considered Spencer Ashlin & Co. the purchasers. And this was not a new idea; for A. Ralli & Co., at the time of the sale, debited Spencer Ashlin & Co. in their books, and made out an invoice to them as purchasers. And Spencer Ashlin & Co. request J. R. and J. Alexander that the bill may be made payable at a banker's, as it "facilitates our discounting the bill:" and, though the bill had already been accepted before J. R. and J. Alexander received this request, they promise to observe it in future; so that it is clear that the bill was intended by both drawer and acceptor to be negotiated by Spencer Ashlin & Co., and to be their property, and was not sent merely to be handed over by them to A. Ralli & Co. Against this is to be set the form of the advice note, which, being a lithographed form used by Spencer Ashlin & Co. in all their transactions, is expressed as if they were brokers buying for a principal; and the language of the order *of J. R. and J. Alexander, and of the invoice sent to them, which state that it was a purchase on account of J. R. and J. Alexander. But this is merely verbal criticism; the substance shows that it was a sale and subsale; indeed, if it were otherwise, there would have been a gross fraud in Spencer Ashlin & Co. in charging an advanced price. Had all the parties continued solvent, A. Ralli & Co. could not have sued J. R. and J. Alexander; nor could J. R. and J. Alexander have resisted an action by Spencer Ashlin & Co.; for, whenever a purchase is made on behalf of a foreign merchant, credit is necessarily given exclusively to the home merchant, who is a vendor to the foreigner, though adding a commission: *Smyth v. Anderson* (1), *Paterson v. Gandasequi* (2), *Thomson v. Davenport* (3). Ireland is, like Scotland, a foreign country within the meaning of this rule.

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Bovill, contra:

The case very much depends upon the question whether Spencer

(1) 7 C. B. 21.

(3) 32 R. R. 578 (9 B. & C. 78).

(2) 13 R. R. 368 (15 East, 62).

Ashlin & Co. were purchasers from A. Ralli & Co., or merely brokers making a contract for them. As to that, the documents are produced; and they must speak for themselves. In the written contract, on 3rd September, Spencer Ashlin & Co. state that the cargo is "Sold by order and for account of Messrs. Antonio Ralli & Co. To our principals;" and they charge the sellers two per cent. commission. And it was perfectly true that they had principals; for J. R. and J. Alexander had given them an order, on 28th August, "to take for us two cargoes of Ibraila." This is not an offer to buy from Spencer Ashlin & Co. as vendors, but an order to that firm to buy as agents for them; and so *Spencer Ashlin & Co. understood it; for, in the letter of 1st September, they write, "We have been unable to purchase anything more to-day in execution of your order." And, on the same day on which they send A. Ralli & Co. the advice note stating that they had sold the cargo for him to their principals at 24/6, they write to J. R. and J. Alexander, "to advise having purchased for your account the cargo of Bulgarian Indian corn per *Cleopatra* at 24/9 per quarter C. F. and I., which is 3d. per quarter over your limit for Ibraila, but is proportionately cheaper:" and in a postscript they tell who was the seller: "A. Ralli & Co. is one of our best sellers." A. Ralli & Co., in their books and in the invoice, debit Spencer Ashlin & Co.: but they debit them with the price after deducting two per cent. commission; and the letter of indemnity explains how that was. One per cent. was for a commission of guarantee; the other one per cent., though this is not expressly stated, must have been the commission on an ordinary sale. It was quite natural that the vendor should debit the *del credere* broker. In the written points delivered it is said that, because Spencer Ashlin & Co. represented to J. R. and J. Alexander that they had bought at 24/9, whereas in truth they had bought at 24/6, the action is undefended as to the extra 3d. But such a representation was a fraud.

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(WIGHTMAN, J.: In the case as you put it, that Spencer Ashlin & Co. were agents for J. R. and J. Alexander, they might have said "We have bought at 24/6, which together with our commission of one per cent. makes it equal to 24/9;" and that would have produced the same money result.)

It might be so: but the account is not so made out. But, in whatever way that extra 3d. may be explained, the transaction is

PENNELL one *of a broker *del credere*; and the fact that an agent has a
 r.
 ALEXANDER. *del credere* commission does not affect the right of the principal
 [*300] to enforce the contract: Story on Agency, s. 420.

(LORD CAMPBELL, Ch. J.: But does not the principal, by taking a *del credere* engagement from an agent, authorize that agent to get payment from the other principal in any way he pleases? And, if so, might not Spencer Ashlin & Co., even if only *del credere* agents, still take the bill?)

If they were authorized to take a bill, the bill would belong to the vendors A. Ralli & Co., not to the assignees of the bankrupt factor: *Ex parte Dumas* (1), *Scott v. Surman* (2). Supposing that a merchant in Ireland is to be considered a foreign principal, the mercantile rule of giving credit exclusively to the home agent is for the benefit of the vendor not of the agent: but in *Thomson v. Davenport* (3) the vendor recovered against the principal though resident in Scotland. The correspondence after the stoppage of Spencer Ashlin & Co. ought not to have much weight. The parties then were seeking how they might best save their money; and they by mistake thought that they could stop *in transitu*. They did, no doubt, by their conduct make evidence that the sale was to Spencer Ashlin & Co.; and, if there had been no other evidence, that should have prevailed: but the real transaction appears.

(He admitted that the averment that the bill was not to be negotiated was not proved, but prayed leave to amend under the power reserved in the case. Some discussion ensued as to the manner in which the plea *should be amended; ultimately it was amended as stated, *ante*, p. 471.)

Bramwell, in reply. * * *

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a subsequent day in this Term (January 31st), delivered the judgment of the COURT:

[303] We are of opinion that the plaintiffs are entitled to recover. If this decision operates a hardship upon Antonio Ralli, who has indemnified the defendants, he has himself to blame for entries in his books, and letters written by him, giving an untrue account of the transaction out of which the bill of exchange declared upon

(1) 1 Atk. 232.

(2) Willes, 400.

(3) 32 R. R. 578 (9 B. & C. 78).

originated. The question is, whether we are to consider that the cargo of the *Cleopatra* was sold by him to the defendants through Ashlin as his agent, or that he sold the cargo to Ashlin, and that Ashlin resold it to the defendants.

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Upon the former supposition, the fourth plea would be established; and, the bill accepted by the defendants for the cargo of the *Cleopatra* remaining in Ashlin's hands down to the time of his bankruptcy, the property in it would not vest in his assignees, as he held it only as trustee for Ralli, nor could the assignees recover the price of the corn as for goods sold and delivered. The plaintiffs indeed have said that, as to the difference between the 24/6 and 24/9 a quarter, this is an undefended action; but, although Ralli might not be entitled to recover more than at the rate of 24/6, if the corn never was the property of Ashlin his assignees cannot sue for any part of the price of it; for the fraud which he perpetrated in charging the defendants a higher price than that at which he had purchased as their agent could vest no right of action in his assignees.

On the other hand, if this was a sale by Ralli to Ashlin and by Ashlin to the defendants, the fourth plea is not supported; there was no right to stop *in transitu*, on Ashlin's insolvency, after the resale and the bill of lading had been indorsed to the defendants; and the *assignees are entitled to recover on the bill of exchange.

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In coming to the conclusion that this was a sale by Ralli to Ashlin, we wish it to be understood that in this case we attach no weight to the circumstance that the defendants resided at Londonderry, and for some purposes might be regarded as foreigners. We do not think that the class of cases headed by *Paterson v. Gandasequi* (1) have any application to such a dealing; and we should have arrived at the same conclusion had the defendants resided at Plymouth or Newcastle-upon-Tyne. We are influenced by the written documents evidencing the transaction, which, we think, satisfactorily show that Ralli treated Ashlin as the purchaser of the corn, and looked to him exclusively for payment. Ashlin was certainly supposed by Ralli to be selling the corn to a purchaser at the price for which Ralli was credited, Ashlin receiving no profit beyond a commission: and he made the defendants believe that he charged no more than the price at which he purchased in the market. But still he was considered by Ralli as the purchaser, and by the defendants as the vendor. Although

(1) 13 R. R. 368 (15 East, 62).

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the sold note in the lithographed form has the aspect of Ashlin being only a broker, by "our principals" Ralli seems to have understood Ashlin himself; for in his own books he immediately made an entry stating that Ashlin was indebted to him for the cargo of the *Cleopatra*, in the common form as if Ashlin had been the purchaser; and, along with the bill of lading and shipping documents connected with the cargo, he sent to Ashlin an invoice of which the following is a copy.

[305] " Messrs. S. ASHLIN & Co. LONDON, September 3rd, 1851.

Bought of A. Ralli & Co.

The cargo of Indian corn per *Cleopatra* Captain Saliaris @ Ghiacetti, as per bill of lading dated 10th July,

14,000 kilos I. corn at 816^{kos} per 100 qurs.,

equal to 1,715 $\frac{5}{8}$ quarters, at 24/6 per quarter

C. F. and I. £2,101 12 10

Charges.

Freight on 1,715 $\frac{5}{8}$ quarters at

9/8 per quarter £798 9 6

Gratuity 15 0 0

808 9 6

Advance to captain @ Ghiacetti 200 0 0

608 9 6

1,498 3 4

Commission 2 per cent. . . . 42 0 8

" E. E. A. R. & Co.

£1,451 2 8"

Ashlin, in writing to defendants and sending them the bill of lading and shipping documents, does state, and state falsely, that he had purchased the cargo of the *Cleopatra* on their account at 24/9 the quarter; and, by his invoice making the price to amount to 1,525*l.* 16*s.* 3*d.*, he represents that the cargo was bought by order and for account of J. R. and J. Alexander; but even then he acts as a principal; for he desires them to make the bill he drew against the cargo of the *Cleopatra* "payable at a banker's, as," he says, "this is sometimes looked to, and facilitates our discounting the bill."

Ralli's subsequent conduct and declarations clearly indicate that he had sold the cargo of the *Cleopatra* to *Ashlin; for, Ashlin having stopped payment while the *Cleopatra* with the cargo on

board was at Falmouth on her way to Londonderry, Ralli stopped the cargo *in transitu* on the ground of the insolvency of Ashlin, whom he treated as the purchaser.

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The defendants in this stage of the transaction represent themselves as the purchasers from Ashlin, not from Ralli; for in their letter of 11th October, 1851, to Lashbrooke they say: "We hold the bill of lading indorsed by Ralli & Co.; but we understand they have some dispute with the original purchasers of the cargo:" and, in their letter of the same date to Ralli, they say: "We are to-day in receipt of a letter from Ashlin & Co., from whom we bought the cargo of corn per *Cleopatra*." They then go on to deny Ralli's right to stop *in transitu*, they having purchased from Ashlin.

The subsequent arrangement between the defendants and Ralli, by which they were allowed to receive the cargo, paying him at the rate of 24/6 a quarter, and he indemnifying them from their liability on the acceptance and against any demand of Ashlin, or his assignees, could not prejudice the rights of the assignees if the cargo had been sold by Ralli to Ashlin.

Upon the whole, we are opinion that the defendants are liable in this action, and that Ralli, paying the amount of the bill under his guaranty, must be contented to take a dividend, under the *fiat* against Ashlin, along with Ashlin's other creditors.

Judgment for the plaintiffs.

MOWATT v. LORD LONDESBOROUGH (1).

(3 EL. & BL. 307—336; S. C. 23 L. J. Q. B. 177; 18 Jur. 1094; 22 L. T. O. S. 303.)

1854.
Jan. 13.

[307]

The provisional directors of a projected Railway Company issued circulars, stating that they had made arrangements with the S. Company securing important advantages to the projected Company, which justified the directors in asserting that their proprietors would be insured against loss, and in proceeding to Parliament, and adding, "in the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction."

This circular coming to plaintiff's knowledge, he applied in writing for shares: the directors, in a written answer, inclosing the circular, stated that shares were allotted to him; that he must pay the deposit by a day named; and, on his doing so and presenting the letter, a receipt would be given him, which would be exchanged for scrip on his executing the Parliamentary contract and subscribers' agreement. He paid the deposit, got the receipt, executed the contract and agreement, and got the scrip.

The agreement was a deed, prepared before the issuing of the circular,

(1) Affirmed in Exchequer Chamber, *post*, p. 504.

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in two parts: the subscribing shareholders of the first part, and two trustees of the second. The subscribers agreed with the trustees to form a Company; and the ordinary powers, including those necessary for obtaining an Act, were given to the provisional directors; and it was agreed that such directors should be indemnified in respect of all acts done in pursuance of their powers, and should, out of the funds of the Company, reimburse themselves all expenses incident thereto: that the subscribers should make deposits; that the directors might apply the funds for the purpose of the undertaking as they should think expedient; that, whether the Act should be obtained or not, the subscribing shareholders would indemnify the provisional directors all expenses incurred by them in executing their powers.

No Act was obtained: and the S. Company made no payment. The directors expended part of the fund, raised by the deposits, in expenses *bonâ fide* incurred in attempting to obtain the Act.

On an action for money had and received, brought by plaintiff against a provisional director, who was a party to the circular and subsequent proceedings: Held, that such action lay for the whole deposit without deduction, on the undertaking to return; for that the contract embodying such undertaking was: (1) not merged in the subscribers' deed, which was between other parties, and for other purposes; (2) not superseded by such deed, or controlled by the clause of indemnity therein; the execution of the deed being an act done in the performance of the original contract in consideration of the directors undertaking to return the deposit.

Held, also, that the contract, being made up of the written correspondence and the acts of the plaintiff, was not wholly in writing, and required no stamp.

Before action brought, plaintiff wrote to defendant, stating that he claimed interest from a time named, which was earlier than the date of his demand, and not stating to what time he claimed it: Held a sufficient compliance with stat. 3 & 4 Will. IV. c. 42, s. 28, so as to entitle the jury to give interest from the date of the demand to the time of payment of the principal (1).

After the scrip was obtained as above, the secretary of the Company explained to plaintiff that the reason of the directors issuing the circular was that they had a guaranty from the S. Company against all expenses; and he afterwards wrote to plaintiff, inclosing the circular, and stating that the guaranty of the directors for the return of deposits was made in pursuance of one they had received from the S. Company. Plaintiff then agreed to take more shares, and received a letter of allotment, as before: but, as to some of these last, he named certain persons to whom the shares were allotted, as his nominees and for him; and the scrip was obtained by plaintiff for the whole, he paying all the deposits, but his nominees only executing the contract and agreement in respect of the shares in their names: Held, that plaintiff was entitled to recover the deposits as to this scrip also; there being no distinction between the different contracts as to any of the above points.

ASSUMPSIT (declaration of 14th November, 1849) for 10,000*l.* for money had and received, money lent, interest, and on an account stated.

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Pleas: 1. *Non assumpsit*. Issue thereon.

(1) Followed, *Geak v. Ross* (1875) 44 L. J. C. P. 319, 32 L. T. 666.

2. As to 2,000*l.*, parcel &c., and the causes of action in respect of such sum, payment by plaintiff to defendant, and acceptance and receipt by defendant, of 2,000*l.* in full satisfaction and discharge. Replication, denying payment, acceptance or receipt in full satisfaction &c. Issue thereon.

The particulars of demand stated that the action was “brought to recover the sum of 2,200*l.*, the balance of the deposit of 2*l.* 2*s.* 0*d.* per share, paid by the plaintiff upon 2,000 shares in a projected railway called the Dover and Deal Railway and Cinque Ports Thanet and Coast Junction, of which the defendant was a member.”

On the trial, before Lord Campbell, Ch. J., at the London sittings after Hilary Term, 1853, a verdict was found for plaintiff for 2,871*l.* damages and 407*l.* costs, subject to a special case, to be turned into a special verdict upon the application of either party, upon the facts to be stated; the Court to have power to amend and to dictate the terms of the special verdict, inserting such inferences of fact as they may think proper to draw. The case as stated, so far as is material to the points decided, was as follows.

The defendant, at the time of the transactions which form the subject of this action, bore the name of Lord Albert Conyngham; he subsequently assumed the name of Denison; and, during the pending of this action, was raised to the peerage by the title of Baron Londesborough.

In October, 1845, a projected Company, called the Dover and Deal Railway and Cinque Ports Thanet and *Coast Junction Company, was formed and provisionally registered for the purpose of obtaining an Act of Parliament to enable the said Company to construct a railway from Dover to Deal, by means of a capital of 180,000*l.*, to be raised by subscription in 9,000 shares of 20*l.* each; whereupon a deposit of 2*l.* 2*s.* per share was to be made. And divers persons, of whom the now defendant was one, became members of the provisional committee, and also of the managing committee, and provisional directors of the said Company.

During the latter part of 1845, and early part of January, 1846, negotiations were going on, between the defendant and the said members of the managing committee of the said projected Railway Company and the South Eastern Railway Company, which resulted, in January, 1846, in the latter Company, through their chairman, (for the purpose of encouraging the said projected Company to proceed, and of inducing persons to subscribe thereto) agreeing with the said managing committee, that, if the managing committee would

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not abandon their project, but would proceed therewith, and apply to Parliament for an Act to authorize the making of the said railway, and would hand over the said scheme to the said South Eastern Railway Company in the event of an Act being obtained, the South Eastern Railway Company would, in the event of the application to Parliament failing, insure the Dover and Deal Company against any loss which might be caused to the said Company by such rejection, and would defray and pay all expenses which should be incurred by them in endeavouring to obtain the Act of Parliament, and supply them with money to return the deposits on shares; and would, in the event of the Act being obtained, allot to the proprietors *of the Dover and Deal Company, in lieu of stock in that Company, shares in the South Eastern Railway Company.

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No shares in the said projected Company had been subscribed for before 24th January, 1846.

On 24th January, 1846, a meeting of the committee of management of the said projected Company was held; at which defendant attended, and took the chair; and the result of the negotiation with the South Eastern Railway Company was communicated to the meeting; and the form of a circular letter, stated to have been settled and approved by the South Eastern Railway Company, and which was proposed to be addressed to each applicant for shares in the said projected Company, was produced, and read to the said meeting. Whereupon it was resolved by the said meeting, with the assent of defendant, that the said form of letter should be adopted and sent accordingly.

The said form of letter was as follows.

“DOVER AND DEAL RAILWAY,

“7, COLEMAN STREET, 24th January, 1846.

“SIR,—In forwarding you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing orders of both Houses of Parliament have been complied with, and certain arrangements, entered into with the South Eastern Railway Company, had been brought to a conclusion. The directors have now the greatest satisfaction in stating that arrangements with the South Eastern Company have been concluded: and they are fully justified in asserting that the Company will be placed in such a position as to insure its proprietary against loss; and, in the event of the passing of the *bill, shares in the South Eastern Railway will be allotted to the

proprietors in lieu of stock in this Company. The directors, in making this announcement, feel that the affairs of the Company, as now settled, are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to Parliament with the undertaking with every expectation of success.

"In the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction.

"By order. S. P. Hook, } Joint Solicitors."
G. T. THOMPSON, }

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The case then set out two letters from Mr. Hook, dated 23rd and 24th January, 1846, to Doctor Elliott, a friend of plaintiff, each inclosing a copy of the above circular, recommending the scheme, stating that the Company had "a guarantee with the South Eastern Company against all actions," and offering to allot shares to Doctor Elliott and his friends.

On or about 26th January, 1846, these two letters, with their two inclosures, were shown by Doctor Elliott to plaintiff, who thereupon authorized Doctor Elliott to apply for 500 shares in the said projected Company on plaintiff's behalf. Dr. Elliott accordingly applied to Mr. Hook for 500 shares on behalf of plaintiff. And, subsequently to such application, and shortly after the said meeting of 24th January, 1846, the following letter of allotment, together with a printed copy of the said circular letter above set forth, was forwarded to the plaintiff by the secretary of the Company, acting by the authority of defendant and the other members of the said managing committee.

"Dover and Deal Railway, registered provisionally.

"500 shares, Deposit 2*l.* 2*s.* per share, 1,050*l.*

"No. 1.

"No. 7, Coleman Street, London, 24th January, 1846.

"SIR,—I have to inform you that the provisional directors have, on your application, allotted to you 500 shares in this undertaking; and that the deposit thereon must be paid to one of the under-mentioned bankers, on or before the 29th instant; otherwise the allotment will be void. On presentation of this letter, and payment of the deposit, the bankers will give a receipt, which will be exchanged for scrip on your executing the Parliamentary contract and subscribers' agreement.

"I am, Sir, your most obedient Servant,

"J. M. Hook, Sec^y.

"FRANCIS MOWATT, Esquire."

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Then followed the names of the firms of three Banks, and a blank receipt, which was in the form after given (p. 493).

The Parliamentary contract and subscribers' agreement were forms of deeds which were prepared, to be executed by the subscribers to the said provisionally registered Company, on or about the day they bear date. The Parliamentary contract contains nothing material to this case beyond what is also contained in the subscribers' agreement. The subscribers' agreement is as follows.

“DOVER AND DEAL RAILWAY.

“Subscribers' agreement.

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“This indenture, made the 1st day of January in the year of our Lord 1846, between the several persons whose respective names and seals are hereunto subscribed and affixed in the schedule hereto of the one *part, and William Brook, of” &c., “and William Frederick Forrest, of” &c., “trustees named and appointed, and who hereby agree, to act for the purpose of enforcing and giving effect to the covenants hereinafter contained, of the other part: witnesseth that every person, party hereto of the first part, together with the persons who have subscribed their names and affixed their seals, or who may subscribe their names and affix their seals, in the schedule to one other indenture of the same date, tenor, purport and effect as these presents, and in which said other indenture reference is made to this present indenture, and as concerning only the acts and defaults of himself and herself, respectively, and his and her respective executors and administrators, doth hereby, for himself and herself respectively, and his and her respective heirs, executors and administrators, covenant promise and agree with and to the said W. Brook and W. F. Forrest, their executors and administrators, in manner following; that is to say: That the several persons parties hereto of the first part, together with such other persons as aforesaid, shall and will constitute, and they do hereby, so far as they lawfully can, form themselves into, a Company,” &c. (describing the undertaking). Then followed provisions as to the title of the Company, its capital, and the shares. Provisional directors, of whom defendant was one, were appointed. The parties of the first part agreed to such acts as the provisional directors might judge expedient for giving effect to the rules, restricting their liability to their subscription. Power was given to the directors to manage the undertaking, by having surveys and estimates made, and notices served, and agreements made, &c.;

and taking measures for obtaining an Act or Acts of Parliament. "That the provisional *directors shall be fully indemnified against and in respect of all contracts, arrangements, acts and things whatsoever by them, in pursuance of the powers and provisions of these presents, entered into, made, done and authorized, and they are hereby empowered to retain and reimburse themselves respectively out of the funds of the Company all costs, losses, damages and expenses which they respectively may incur or be put to in or about or incident to all such contracts, arrangements, acts and things." "That every subscriber shall, upon or in respect of every share of the said present capital held by him or her, pay a deposit of 2*l.* 2*s.* per share, at or before the time of subscribing these presents: but, until the proposed Act or Acts of Parliament shall have been obtained, no further deposit or sum shall be called for, except in the event and for the purposes hereinafter expressed: and that no sum exceeding 5*l.* per share of the capital of the said Company shall be applied in or towards the expenses of the proposed application to Parliament. That it shall be distinctly provided in such Act or Acts of Parliament that no call shall be made upon the subscribers to the said undertaking, or any of them, which shall exceed the sum of 2*l.* per share at any one time; and also not more than four calls shall be made in any one year: and that there shall be an interval of three months at least between the calls." The directors were empowered to apply the funds for the purposes of the undertaking, in such manner and at such times as they should think expedient. "That each and every of the said several persons parties hereto of the first part shall and will, within twenty-one days after notice for that purpose in writing," "duly sign, seal and deliver such indentures or Parliamentary *undertakings or subscription contracts, and all such other deeds and agreements, as shall from time to time be required by the standing orders of the Houses of Parliament respectively, or either of them," or which the provisional directors might deem desirable or necessary; "and shall and will at the same time pay to such person or persons as the provisional directors shall appoint to receive the same such further rateable sum per share (if any) as shall be necessary in order to make up any proportion of the subscribers' capital of the said Company which shall for the time being be required by the standing orders of the Houses of Parliament respectively, or either of them, to be paid upon the execution of such Parliamentary undertaking or subscription contract as aforesaid, over and above the amount of

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the deposit ;” “ and shall and will, but subject to the restrictions and limitations hereinafter contained, also duly seal and deliver any other Parliamentary undertaking or undertakings, or subscription contract or contracts, rendered necessary by renewed application or applications to Parliament,” “ and pay such further portion (if any) of the subscribed capital of the said Company as may for the time being be called for by the provisional directors, or may be required by the standing orders of the Houses of Parliament respectively, or either of them ; the same to be paid upon the execution of any such Parliamentary undertaking or subscription contract respectively.” In case of neglect to comply with the powers lastly contained for the execution of such undertaking, contract or deed, or to make such payments, the directors were empowered to determine the interest of the party making default in the undertaking. “ That, whether the said Act or Acts of Parliament shall or *shall not be obtained, the several persons, parties hereto of the first part, shall and will save harmless and keep indemnified the provisional directors, and every individual member thereof, from and against all costs, charges, damages, losses and expenses which they or any or either of them shall or may incur, adopt, sustain, be at or be put unto, in or about the execution of the trusts, powers, directions and authorities committed to them by these presents ; such costs, charges, damages and expenses to be respectively computed, assessed, paid and made good by the said several persons, parties hereto of the first part, respectively, and their respective executors and administrators, rateably, according to the amount of the sum subscribed by the said several persons respectively.” Then followed provisions as to the abandonment of the undertaking under certain circumstances. The deed was signed and sealed by Messrs. Brook and Forrest, the trustees.

The Schedule before referred to.

Christian and Surname.	Description.	Place of Abode.	Amount of Subscriptions.	Amount paid up.	Signature.	Seal.	Date of signing.	Witness.
Albert Conyngnam.	Lord.	Sandgate, Kent.	£ 2,000	£ 210	Albert Conyngnam.	L. s.	1846. 27th January.	S. P. & B. Hook.
Francis Mowatt.	Gentleman.	14 Devonshire Place.	10,000	1,056	Fras. Mowatt.	L. s.	29th January.	Jas. Morley Hook.

The deed above set forth was executed by defendant on 27th January, 1846.

On 28th January, 1846, plaintiff paid to the Commercial Bank of London, being one of the Banks in the letter of allotment mentioned, to an account opened there by the authority of defendant and the rest of the provisional *directors of the Company, the said deposit of 2*l.* 2*s.* per share : and plaintiff received from the said Bank the following receipt, filled up in a form printed at the foot of the letter of allotment as sent to the plaintiff.

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“DOVER AND DEAL RAILWAY,

“No.

“January 28th, 1846.

“Received the sum of 1,050*l.*, on account of the provisional directors of the above named Company. For the Commercial Bank of London. A. G. HALL. 1,050*l.*”

The subscribers' agreement above set forth was executed by the plaintiff in respect of the said 500 shares on the 29th January, 1846.

In the beginning of February, 1846, Mr. Hook applied to plaintiff to take further shares in the Company, and called plaintiff's attention to the printed circular. The plaintiff required some further assurance, and said that, if Mr. Hook would bring him a letter written by the authority of the directors, he would take other shares. Mr. Hook promised to endeavour to do so, but subsequently returned, and said that the board had broken up for the day, so that he could not bring any letter from them, and handed the plaintiff the following letter written by himself without seeing the board.

“7, COLEMAN STREET, 3rd February, 1849.

“Dover and Deal Railway.

“DEAR SIR,—I enclose you, agreeably to my promise, the printed letter setting forth the terms this Company has made with the South Eastern Company, the original of which was revised, approved of and passed by the board of that Company. I also enclose you the announcement the committee of this Company has made to the public ; by *which you will observe the guarantee they give for the return of the whole of the deposits in the event of their not obtaining an Act ; which guarantee they have made in pursuance of one they have received from the South Eastern Railway Company.” Signed by Mr. Hook.

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In this letter was enclosed a copy of the circular of 24th January, 1846. Plaintiff then agreed to take 1,500 more shares : and, on 3rd February, 1846, received a letter of allotment for 750 shares in

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the Company, to the same effect, and issued by the same authority, as his first mentioned letter of allotment, accompanied by another copy of the circular of 24th January, 1846, also so issued. And, on the same day, letters of allotment for 750 other shares, of the same effect, and issued by the same authority, and accompanied by similar letters also so issued, were forwarded to Messrs. Elliott, Fielder and Barnes, at the plaintiff's request, and as his nominees, he not wishing to appear as holder in his own name of so many shares.

On 4th February, 1846, plaintiff paid the deposit, on the 1,500 shares, of 3,150*l.*, in the same manner as the deposit on the first lot, and executed the subscribers' agreement in respect of the 750 shares allotted to him; and, on the same day, Messrs. Elliott, Fielder and Barnes executed the same in respect of the 750 shares allotted to them respectively.

Upon the last mentioned execution of the subscribers' agreement by the plaintiff, scrip certificates were, by the authority of defendant and the other members of the said managing committee, given to the plaintiff in exchange for the banker's receipts of the deposit of 2*l.* 2*s.* each upon the said 500 and 1,500 shares.

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The form of the scrip certificates so given was as follows.

"DOVER AND DEAL RAILWAY COMPANY.

"No. 506 to 510.

"Five shares.



Registered Provisionally. "This is to certify that the holder hereof is the proprietor of 5 shares of 20*l.* each in the above undertaking, on which a deposit of 2*l.* 2*s.* per share has been paid, subject to the fulfilment of the conditions of the Parliamentary contract and subscribers' agreement, which have been duly executed in respect thereof.

"LONDON, 31st January, 1846.

"ALBERT CONYNGHAM } Provisional
"H. W. BEAUCLERK } Directors.

"J. M. Hook,
Secretary."

Before the second lot of shares was applied for by plaintiff, Mr. Hook explained to plaintiff the nature of the guaranty given by the South Eastern Railway Company, so far as to say that the reason of the directors of the Dover and Deal Company issuing the

said circular was, that they had a guaranty in terms from the South Eastern Company against all expenses.

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The whole of the remaining shares in the projected Company were allotted in like manner and under similar circumstances. The scheme for the formation of the said Company was perfectly fair and *bonâ fide*, and was only abandoned by reason of the determination of the group committee hereinafter mentioned. The *standing orders of both Houses of Parliament were duly complied with. A bill was, in the Session of 1846, promoted by defendant and the said other members of the managing committee, but was lost: and no bill for the construction of the said projected railway was ever passed.

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The deposit made with the Accountant-General, in compliance with the standing orders of Parliament, was accordingly, on the 1st July, 1846, received back; and, out of the deposit so paid as aforesaid, defendant and the other provisional directors of the Company, subsequently, on 4th August, 1846, returned to plaintiff and the other allottees of shares in the projected Company the sum of 1*l.* per share. The residue of the deposits, so paid by plaintiff and other allottees, was spent upon the reasonable and necessary expenses of the said application to Parliament, being such as fell within the terms of the said subscribers' agreement, if that deed gave authority to the directors to deal with the deposits as against plaintiff, with the exception of a small balance of about 309*l.*, which was subsequently handed over to the official manager charged with the winding-up of the Company under the Winding up Acts; but which is not enough to satisfy the still unpaid expenses of the application to Parliament, being similar expenses to those before mentioned.

On 18th December, 1846, plaintiff wrote and sent to the provisional directors of the Company a letter as follows:

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"GENTLEMEN,—I hold 1,830 shares of the Dover and Deal Railway Company, the remainder of the deposit money on which, amounting to 1*l.* 2*s.* per share, I have for a long time been in daily expectation of receiving a notice from you to apply for, in pursuance of the engagements subsisting between us. Having made several applications, however, at the office to your solicitor and the secretary, without being able to learn when you propose to return the said remainder of the said deposit money, and a period of six months having now elapsed since the rejection of the bill by Parliament, I have to request that you will be pleased, without

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further delay, to repay to me the said money, amounting to 2,013*l*. I have to add that I shall expect to be paid interest, at the rate of 5*l*. per cent. per annum, on the said money, commencing from one month after the return of the money to you by the Accountant-General: which period, together with the interval that intervened from the rejection of the bill, I think was amply sufficient to enable you to make the necessary arrangement for the repayment of the said money." * * *

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To which plaintiff received the following reply on or about the date thereof.

"6th January, 1847.

"SIR,—In answer to your letter of the 18th ultimo, addressed to the board of this Company, I am directed to inform you that they have not yet been able to obtain a settlement with the South Eastern Company; but that they have taken proceedings against them for that purpose, the results of which will be communicated to the shareholders immediately it is known. And I am desired to add that the directors will at all times be ready and happy to afford you any information upon the subject you may require. I am, Sir, your most obedient servant, J. M. Hook, Sec^y. FRANCIS MOWATT, Esqr^e."

The plaintiff being unable to obtain a return of the balance of his deposit money, commenced an action in January, 1847, in the Court of Exchequer, against Mr. Thompson, one of the managing committee of the Company, but was ultimately nonsuited in that action, on the ground that Mr. Thompson had not joined until after Mr. Mowatt had paid his deposit. The present action was then brought, and came on for trial after Trinity Term, 1850: when it was arranged that the trial should stand over till the result should be seen of an action which *had been brought by the managing committee of the Company against Mr. McGregor, the chairman of the South Eastern Railway Company, in respect of their undertaking before alluded to, and in which action the plaintiffs had obtained a verdict. The judgment signed by the plaintiffs in the action against the chairman of the South Eastern Company was afterwards reversed in the Exchequer Chamber, the Judges of which decided that the undertaking before alluded to was not binding either on the South Eastern Company or Mr. McGregor. The South Eastern Company and Mr. McGregor have repudiated any liability to the Dover and Deal Company or its managing committee.

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At the trial, the defendant took the following objections, which raised the question for the opinion of the Court.

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1. That the contract (if any) to return the deposit on the terms contained in the circular accompanying the letters of allotment became merged by the execution by the plaintiff of the subscribers' agreement, the same being an instrument under seal.

2. That, assuming that the said deed did not operate as a merger, the plaintiff thereby authorized the directors to expend the deposits in the mode pointed out, so that the moneys in question never became moneys had and received to the use of the plaintiff.

3. That the letter of allotment, and the accompanying circular, amounted only to a proposal which never was accepted; or, if such letter and circular, or the banker's receipt, or scrip, amounted to a contract, they or one of them ought to have been stamped.

4. That the plaintiff cannot recover in respect of the *shares subscribed for by Dr. Elliott, Mr. Fielder and Mr. Barnes.

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5. That the letter of the plaintiff of the 18th December, 1846, is not a sufficient demand of interest within stat. 3 & 4 Will. IV. c. 42, s. 28, to entitle the plaintiff to recover interest on the deposits.

The Court are to draw such inferences of fact as a jury ought; and such inferences of fact as the Court think right are to be stated in any special verdict which may be framed.

The question for the opinion of the Court is: Whether the verdict for the plaintiff should stand, either wholly or in part; and, if so, for what amount; or whether a nonsuit should be entered, or new trial had.

Willes, for the plaintiff:

There is no distinction between the several sets of shares. In each case, by the circular, the allotment and the payment, there is a contract that the directors will return the whole deposit if the Act is not obtained. The money belongs to the plaintiff; and he is the proper party to sue for it. Even the beneficial interest is his; though it would be enough if he were a trustee for his nominees.

First, there can be no merger. The contract now sued upon is between the plaintiff and defendant: the subscribers' deed is not between the same parties, but between the several subscribers and the two trustees, Messrs. Brook and Forrest. And the contract in that deed is distinct from that sued on.

Next, the contract is not superseded by that contained in the deed. The deed contains no release or waiver of liability. Nor

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was it contemplated that one should be substituted for the other; the execution of the deed by the plaintiff is one of the considerations for the contract sued on. That it does not affect the contract constituted by the circular, the letter of allotment and the payment of the deposit, was decided, in effect, by *Mowatt and Elliott's* case (1). * * "The directors said to Mr. Mowatt, 'If you will execute the deed, we will indemnify you;' he did execute the deed, and now they say, 'We are not the persons to indemnify you.' I think they entirely fail in that argument."

[*326] (LORD CAMPBELL, Ch. J.: Does the indemnity *clause in the deed really create any relation which would not exist without it? Would not an agreement to return the money, if the Act was not obtained, be implied? And would not a claim on such implied agreement be answered by the fact that the money had been expended in attempting to obtain the Act? And is not that tantamount to an indemnity, up to the amount of the deposit?)

That seems to be so: and the question therefore is, how far the express and unqualified agreement to return the money, in case the Act is not obtained, varies the liability. And, even if the indemnity clause in the deed can take effect, it must be enforced by a cross action.

(WIGHTMAN, J.: Probably it was taken for granted that the South Eastern Railway Company would carry their agreement into effect.)

That must have been so: and, had this taken place, the plaintiff would unquestionably have been entitled to recover back the whole deposit: and his rights can surely not be affected by the refusal of the South Eastern Railway Company: the act of that Company is not made a condition of the defendant's promise. * * *

[328] Lastly, as to the interest. The question is, whether the plaintiff's letter of 18th December, 1846, satisfies the condition imposed by stat. 3 & 4 Will. IV. c. 42, s. 28, "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." The letter certainly does give notice of a demand from an earlier day: the plaintiff demands therefore too much: but he does demand enough; the less is contained in the greater.

(LORD CAMPBELL, Ch. J.: May it mean that he will not be

(1) 3 D. M. & G. 254.

contented with less than what he names? If he had named less, perhaps he would have been paid.)

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The interest is calculated, not from the earlier day, but from the date of the demand.

Byles, Serjt., contra :

A distinction must be made between the shares assigned to the plaintiff and those allotted to his nominees. As to the latter, the shares not being transferable, the directors dealt only with the actual allottees: the Parliamentary contract and subscribers' agreement were to be, and in fact were, executed by them, not by the plaintiff, who must be considered only as making the payment for them; and they are the proper parties to maintain the action; the obligation to execute and the right to recover must be in the same persons. Mowatt would not, in respect of these shares, be bound by the indemnity clause in the deed.

The question as to the merger becomes unimportant upon either view as to the next question.

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The next question is, whether, if there was a contract anterior to the execution of the subscribers' deed, that contract is superseded by the deed. Now the agreement insisted on, to return the deposit, was no more than the law would imply; and the express contract therefore does not, in this respect, vary the position of the parties. Then the clause in the subscribers' deed provides for the indemnity of the directors, whether or not the Act shall be obtained; and there is power given to the directors to apply the funds for obtaining the Act. Now these terms are not required by the Parliamentary standing orders; * * the plaintiff might have refused to sign it: *Ashpitel v. Sercombe* (1): the parties, therefore, in executing the deed, were doing more than carrying out the supposed pre-existing contract. They therefore, after such execution, stand in a legal relation to be determined by the deed.

(LORD CAMPBELL, Ch. J.: Suppose the South Eastern Railway Company had paid the expenses, so as to enable the directors to return the deposit.)

The money would then have been applicable to the return of the deposit.

(COLERIDGE, J.: As money had and received.

(1) 82 R. R. 610 (5 Ex. 147).

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LORD CAMPBELL, Ch. J. : Suppose the deposit had been all spent before the South Eastern Railway Company made the payment.)

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There would then not have been money had and received to the use of the allottees, unless there had been an express consent, by the directors, to hold the money so paid to the use of the allottees. The subscribers' deed authorized the directors to apply the deposits to the obtaining of the *Act ; and the previous contract did not control this : *Watts v. Salter* (1). In that case it was held that, in the absence of fraud, the plaintiff could not recover for money had and received, under circumstances similar to those of the present case, except that there the undertaking to return the money was implied, and not express as here.

(LORD CAMPBELL, Ch. J. : Is it quite clear that there was such an implied undertaking in that case ?)

It seems so from *Nockels v. Crosby* (2).

(LORD CAMPBELL, Ch. J. : In this case, the contract, under which the plaintiff says he is to have the money returned, contemplated the execution of the subscribers' deed.)

It is not shown that the deed contemplated by both parties was to be in these terms. If the plaintiff had not chosen to exchange the receipts for scrip, he need not have executed the deed : and the effect of the original contract seems to be that, if he stopped there, he was to have his money back on the failure to obtain the Act ; but that, if he went on, executed the deed and took the scrip, then he was bound by the terms of the agreement.

(LORD CAMPBELL, Ch. J. : You must take it as if all was done *uno flatu*.)

That is scarcely reconcileable with *Watts v. Salter* (1). But, supposing the whole contemporaneous, some effect must be given to the indemnity clause in the deed ; and the plaintiff's construction gives none. The original undertaking is to return the deposits themselves, not a sum equivalent to them : the deed expressly authorizes the application of the deposits, with a clause exempting the directors from loss. * * *

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As to the interest, the letter of 18th December, 1846, does not

(1) 84 R. R. 659 (10 C. B. 477).

(2) 27 R. R. 497 (3 B. & C. 814).

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satisfy the condition of stat. 3 & 4 Will. IV. c. 42, s. 28. That is a statutory condition: "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." The letter claims the interest from another date. The intention of the statute was that the party receiving the notice should be informed what interest was payable: it is no answer to this to say that the less is included in the greater: the demand of the greater frustrates the object of the Act. The analogy of a prior demand in the case of a tender is applicable: if too much is demanded it is no demand. Besides, the letter does not state down to what time the interest is claimed: the claim should be "until the term of payment:" it rather seems that the claim is meant to be down to the date of the demand.

Willes, in reply. * * *

Cur. adv. vult.

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LORD CAMPBELL, Ch. J., in this Term (January 13th), delivered the judgment of the Court:

Having considered this case, and examined all the authorities cited during the argument, we are of opinion that the plaintiff is entitled to recover.

He seems clearly to have a *prima facie* case, if the deed is not taken into consideration; for, although the sum sought to be recovered was spent by the provisional directors in the promotion of the scheme, there is here an express undertaking, in the event of the bill not being obtained, to return the whole of the deposits without deduction. If the bill was introduced into Parliament, some expense must have been incurred by the directors, which, without the undertaking, they might have deducted from the deposits, the bill being lost: but the undertaking shows that the expense was to be borne by the directors, and not to be thrown upon the scrip-holders.

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We are now to see the effect of the deed, coupled with the undertaking of the South Eastern Counties Railway Company, and the dealings between that Company and the provisional directors of the Deal and Dover Company. Looking merely to the letter of allotment and the deed, the deed would justify the directors in applying the deposits to the promotion of the scheme; and the amount so applied by them could not be recovered back by the scrip-holders. But the contract between these parties is to be collected from all the documents and facts stated in the special

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case. And this contract, we think, was, that, in the events which have happened, the whole of the deposits should be returned without deduction. Due weight must be given, not only to the express undertaking by the directors, but to the undertaking of the South Eastern Counties Railway Company. This is referred to in the circular, and is made the foundation of the undertaking of the Deal and Dover directors to their scrip-holders. If the South Eastern Counties Railway Company had performed their undertaking, it was admitted in the argument that this action would be maintainable. But surely the directors took upon themselves the risk (whatever it might be) of the South Eastern Counties Railway Company not performing their undertaking. The undertaking of the directors in the circular is not qualified by that or any other contingency. In the action against the South Eastern Counties Railway *Company, the decision of the Court of Exchequer Chamber, by possibility, may be reversed by the House of Lords; and, at any rate, the Deal and Dover directors seem to be the parties to suffer, if they have negligently entered into an invalid contract with third parties, which they held out to be sufficient to justify them in absolutely undertaking to return the whole of the deposits without deduction.

But various objections were made at the trial, on which the opinion of the Court is desired.

1st. That the contract to return the deposit on the terms contained in the circular became merged by the plaintiff's execution of the deed. We do not think that there was, first, one contract by the allotment and the payment of the deposit, and, then, another by the deed. It appears to us that all the documents enter into one contract, and that they have the same effect as if they had all been signed and delivered *uno flatu*. This is not a case in which the doctrine of a simple contract merging in a specialty can apply; for the deed is not between the same parties as the simple contract; and the subject-matter contracted for is different.

Secondly. It is said that, at all events, the deed deprives the plaintiff of his remedy, by authorizing the directors to prosecute the scheme with the deposits, and agreeing to indemnify them. This certainly would be so, were it not for the express undertaking by the directors to return the deposits without deduction, in consequence of the expected indemnity from the South Eastern Counties Railway Company. But this undertaking distinguishes the present case from the cases relied upon by the defendant. Promises are to

be construed according to the sense in which the promisor *must be supposed to wish and to believe that the promise should be understood by the promisee; and we cannot doubt that the directors of the Deal and Dover Company wished and believed the allottees of their shares to understand that, after they had paid the deposit, obtained the banker's receipt, exchanged it for the scrip certificate, and executed the deed, they were sure to have the whole deposit returned, if the bill should not pass. The deed which the plaintiff did execute had been prepared before the circular was issued; and it is evidently the deed referred to in the letter of allotment. It cannot, therefore, be supposed that the directors intended that the plaintiff, by executing that deed (he being bound to execute it before he could have the scrip certificate), was to lose all benefit from their express undertaking, which they gave as an inducement to him to become a shareholder.

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The next objection is upon the stamp laws. But it is allowed that the case of *Ward v. Lord Londesborough* (1), in the Common Pleas, referred to in the argument, is an express authority to show that, as far as the five hundred shares allotted to the plaintiff in his own name are concerned, no stamp was necessary. We entirely approve of that decision; and, further, we think that, for this purpose, no distinction can be made between these shares and the shares allotted to the nominees of the plaintiff for his benefit, there being no perfect contract evidenced by writing with respect to any of them. This seems in conformity with what is laid down by PATTERSON, J., in delivering the judgment of the Exchequer Chamber in *Chaplin v. Clarke* (2).

The only remaining point is as to the interest. The demand in the plaintiff's letter of 18th December, 1846, does not follow the very words mentioned in stat. 3 & 4 Will. IV. c. 42, s. 28, but we think it a sufficient compliance with that statute, as it gives abundant notice to the defendant, that, if he keeps the plaintiff's money longer in his hands, he will be held liable for interest upon it from the time he is served with the demand till the time of payment of the principal.

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Upon the whole, we are of opinion that the verdict for the plaintiff for principal and interest ought to stand.

Judgment accordingly.

(1) 12 C. B. 252.

(2) 4 Ex. 408.

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June 19.

[4 EL. & BL. 1]

(4 EL. & BL. 1—12; S. C. nom. *Lord Londesborough v. Mowatt*, 23 L. J. Q. B. 38; 18 Jur. 1094; 23 L. T. O. S. 235.)

Assumpsit for money had and received, and interest. *Plea*: *Non assumpsit*: issue thereon. A special verdict, containing the inferences drawn by the Q. B. on a special case, set out the facts substantially as stated in the head-note of the case in the Court below (1), and concluded by stating that at the trial five points were made. 1st. That the contract, if any, between plaintiff and defendant was merged in the Parliamentary contract, that being under seal. 2nd. That the deed authorized the expenditure of the money, and therefore money had and received would not lie. 3rd. That the documents admitted in evidence were not properly stamped. 4th. That plaintiff could not recover in respect of the shares subscribed for by E., F. and B. Lastly, that the demand of interest was not sufficient within stat. 3 & 4 Will. IV. c. 42, s. 28. And the jury referred these five points to the Court.

Judgment being given in the Queen's Bench for the full amount, with interest, on the special case, and judgment having afterwards been entered up there on the special verdict:

Held, on error in Exch. Ch., that the Court could consider only the points referred to them by the jury. That, as to these, 1st, there could be no merger, the agreement and deed not being between the same parties. 2ndly, that it sufficiently appeared that the defendant agreed to return an amount equivalent to the deposits, and that it was not any objection to an action for money had and received that by the agreement the specific money deposited might lawfully be spent, and an equivalent amount paid. 3rdly, that the objection to the admissibility of the evidence could not be raised on a special verdict. 4thly, that, the only point referred by the jury being whether the execution of the deed by E., F. and B. was a bar to the plaintiff's right to recover, there was ground disclosed on the verdict on which plaintiff might recover notwithstanding that fact. Lastly, that the demand of interest was sufficient under stat. 3 & 4 Will. IV. c. 42, s. 28 (2).

Judgment affirmed.

ASSUMPSIT for money had and received, money lent, interest, and on an account stated.

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Pleas: 1. *Non assumpsit*. Issue thereon. 2. Payment. Replication, to second plea, denying the payment. Issue thereon.

On the trial, before Lord Campbell, Ch. J., a verdict passed for the plaintiff subject to a special case, to be turned into a special verdict upon the application of either party, upon the facts to be stated; the Court to have power to amend and to dictate the terms of the special verdict, inserting such inferences of fact as they might think proper to draw.

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The Court of Queen's Bench having given judgment *for the

(1) *Ante*, p. 485.(2) Followed: *Geak v. Ross* (1875)
44 L. J. C. P. 319, 32 L. T. 666.

plaintiff, the case was, on the application of the defendant, turned into a special verdict, on which judgment was entered in the Queen's Bench for the plaintiff. The defendant suggested error.

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The special verdict found as facts all the statements in the special case. The material parts will be found set out in the report of the case below (1). In addition to the facts stated in the special case, the verdict further found that on 4th February, 1846, when Messrs. Elliott, Fielder and Barnes executed the deed in respect of the 750 shares, as stated in the special case (2), "the said Messrs. Elliott, Fielder and Barnes were, and were known by the defendant and the other provisional directors to be, merely formal and nominal parties; and the said deposit was paid by the plaintiff; and the whole beneficial interest therein always was in him, and not in them or either of them." And it was also afterwards found that "the said circulars were so sent, by the defendant and the said other provisional directors, as aforesaid, to the plaintiff for the purpose of inducing him to believe and expect that, if the said deposits were paid and the said deed executed in respect thereof, as aforesaid, the amount thereof would be returned by the defendant and the said other provisional directors to the plaintiff, in the event of failure to obtain the said Act of Parliament, incorporating the said projected Company and enabling them to make the said projected railway; and the plaintiff was accordingly thereby induced to, and did, make the said deposits in that belief and expectation and upon those *terms." These findings were inserted as inferences of fact by the Court, under the power reserved to them.

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The special verdict concluded: "and the jurors aforesaid upon their oath aforesaid further say that, at the trial, the defendant took the following objections to the plaintiff's right to recover.

"1st. That the contract (if any) to return the deposits on the terms contained in the said circular accompanying the letters of allotment became merged by the execution by the plaintiff of the subscribers' agreement, hereinbefore set forth, the same being an instrument under seal.

"2nd. That, assuming that the said subscribers' agreement did not operate as a merger, the plaintiff thereby authorized the directors of the said Dover and Deal Company to expend the deposits in the mode pointed out, so that the moneys in question never became moneys had and received to the use of the plaintiff.

"3rd. That the letter of allotment, and the accompanying circular,

(1) *Ante*, p. 485.

(2) *Ante*, p. 494.

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amounted only to a proposal which was never accepted; or, if such letter and circular, or the banker's receipt, amounted to a contract, they or one of them ought to be stamped.

"4th. That the plaintiff could not recover in respect of the shares subscribed for by the said Dr. Elliott, Mr. Fielder and Mr. Barnes, as hereinbefore mentioned.

"5th. That the said letter of the plaintiff of the 18th December, 1846, was not a sufficient demand of interest, within stat 3 & 4 Will. IV. c. 42, s. 28, to enable the plaintiff to recover interest on the deposits.

['5]

"But whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said *objections are valid and ought to prevent the jurors from finding that the defendant did promise in manner and form as in the declaration in that behalf alleged, either as to the whole or any part of the causes of action mentioned in the declaration, the jurors aforesaid are altogether ignorant: and therefore they pray the advice of the Court of our lady the Queen before the Queen herself." They then referred the manner in which the verdict should be entered to the Court.

The case was now argued.

Byles, Serjt., for the defendant (the party suggesting error), argued that the facts disclosed on the special verdict showed no contract to return the money, or at most a contract which ought to have been declared on specially, and that money had and received would not lie. On these points it is sufficient to refer to the argument of the learned Serjeant in the Court below. He now admitted that there could not be a merger of the contract, if there was one, in the deed, as the parties were not the same. An intimation of opinion was given from the Bench, that the question of the validity of the stamp was not open on this proceeding, as, supposing the document to have been inadmissible, the proper remedy was by a bill of exceptions for misdirection in admitting it in evidence, and not by impeaching the verdict founded upon it when received. This point was not further pressed in argument. The learned Serjeant further argued that the letter of 18th December, *1846, was not a sufficient demand within stat. 3 & 4 Will. IV. c. 42, s. 28, as it gave notice of a claim of interest from an unascertained day, instead of from the date of the demand, and did not show on what sum, or up to what time, the interest was claimed.

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Willes, contra, was desired by the Court to confine his argument to two points. 1st. Whether, taking the contract to be, in substance, that the defendant would, in the event of the Act not being obtained, return the deposits, on the condition that the plaintiff would make the deposits and execute the deed, there was a sufficient finding of an agreement to take the execution by Elliott, Fielder and Barnes in lieu of the execution by the plaintiff: and, 2ndly, as to the sufficiency of the demand of interest, within stat. 3 & 4 Will. IV. c. 42, s. 28.

As to the first of these points. The contract does not appear to be such as to make the execution of the deed a condition precedent to the plaintiff's claim; but, if it was, there is ample evidence that the contract was that the deed should be executed by the plaintiff's nominees to whom the circulars were sent, as is expressly found, with the defendant's knowledge. No point, as to this part of the case, is referred by the jury to the Court. It is not therefore necessary that the verdict be precise upon it; for "the Court will not doubt of any thing but what is referred to the Court by the verdict:" Com. Dig. Pleader (S. 35).

Then, as to the interest. The letter of 18th December, 1846, gives distinct notice that interest *will be claimed "commencing from one month after the return of the money to you by the Accountant-General." It is true that the words of stat. 3 & 4 Will. IV. c. 42, s. 28, are "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment;" and this letter, in terms, gives notice that it will be claimed from a time antecedent to the date of the demand. * * And, though the notice does not in terms say that interest will be claimed "until the term of payment," that is implied. It is not desirable that instruments which are to be written by mercantile men should be construed in courts of law with technical strictness. That was done in *Solarte v. Palmer* (1), and has been regretted.

Byles, Serjt., was heard in reply.

Cur. adv. vult.

PARKE B., on the following day (June 20), delivered judgment:

In this case, which was argued yesterday, we are of opinion that the judgment of the Court of Queen's Bench should be affirmed.

The special verdict, after stating all the material facts at length,

(1) 37 R. R. 34 (2 Cl. & Fin. 93; 1 Bing. N. C. 194).

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[*8]

adds that at the trial the defendant, the now plaintiff in error, took five objections to the right of the plaintiff below to recover: and the sole question referred *to us by the jury is whether the said objections so taken were, or any of them was, sufficient in point of law to bar the plaintiff's action. These objections were five in number.

1st. That the contract (if any) to return the deposits on the terms contained in the said circular accompanying the letters of allotment became merged by the execution by the plaintiff of the subscribers' agreement, hereinbefore set forth, the same being an instrument under seal.

2nd. That, assuming that the said subscribers' agreement did not operate as a merger, the plaintiff thereby authorized the directors of the said Dover and Deal Company to expend the deposits in the mode pointed out, so that the moneys in question never became moneys had and received to the use of the plaintiff.

3rd. That the letter of allotment, and the accompanying circular, amounted only to a proposal which was never accepted; or, if such letter and circular, or the banker's receipt, amounted to a contract, they or one of them ought to be stamped.

4th. That the plaintiff could not recover in respect of the shares subscribed for by the said Dr. Elliott, Mr. Fielder and Mr. Barnes, as hereinbefore mentioned.

5th. That the said letter of the plaintiff of the 18th December, 1846, was not a sufficient demand of interest, within stat. 3 & 4 Will. IV. c. 42, s. 28, to enable the plaintiff to recover interest on the deposits.

We are of opinion that all of these objections were unfounded.

As to the first: In the argument before us it was rightly conceded that there was no merger of the contract, to return the deposits, by the execution of the *subscribers' agreement, which was between different parties.

As to the second: The subscribers' agreement certainly did authorize the directors to expend the deposits in the mode pointed out therein; and they were expended to the extent of 1*l.* 2*s.* per share: but, with respect to the deposit on the 500 shares, applied for by the plaintiff, and allotted to him by name, the circular letter accompanying the letter of allotment, and authorized by the defendant, clearly amounts to a promise on his part, independently of the engagement with the South Eastern Railway Company, to return the whole of the deposits to the plaintiff without deduction, in the

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event of the Act of Parliament, which the provisional directors were petitioning for, not being obtained. The letter of allotment announced that those directors had allotted to the plaintiff 500 shares, that a deposit was to be made by payment to certain bankers, and that, on presentation of that letter, the bankers would give a receipt, which would be exchanged for scrip certificates on the plaintiff executing the Parliamentary contract and subscribers' agreement. The plaintiff did subscribe that Parliamentary contract and subscribers' agreement, which the defendant, by the letter of allotment, intended him to execute, as the condition on which he was to obtain scrip certificates, which certificates he did afterwards obtain.

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We are all clearly of opinion that the promise of the defendant to return the deposits was in no way affected by the execution of that Parliamentary contract and subscribers' agreement. The circular was sent with the letter of allotment, and are both to be read *together as the agreement; and the meaning is that, if the plaintiff makes the required deposit, he shall be entitled to the proposed number of shares; and, further, that he should have a receipt from the banker which, on executing that particular Parliamentary contract and subscribers' agreement which he actually did execute, he should be entitled to exchange for scrip certificates for the shares; but still, if the application to Parliament failed, the defendant was to return the deposits without deduction. It would be inconsistent to hold that the execution of that very instrument, which the agreement contemplated, if not as a condition to the performance of the defendant's undertaking, yet certainly as a most probable occurrence preliminary to it, should altogether destroy the plaintiff's right to insist on that performance. We therefore concur with the Court of Queen's Bench in thinking that the plaintiff is entitled to enforce the undertaking to return the deposit on those 500 shares.

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But it was argued, by my brother *Byles*, that this should have been the subject of a special action of assumpsit on the contract to return the money; and that the action for money had and received would not lie. It would be very hard if it were so, as such a count has been on two occasions struck out, as we are informed by *Mr. Willes*, as being equivalent to a count for money had and received. But we have no doubt that an action for money had and received will lie. The defendant receives a sum of money, deposited upon an undertaking that, on a given event, the same amount of money, not the same identical coins or notes which have been paid, should be forthcoming to repay the plaintiff. In the meantime, if the

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defendant expends the money paid to him for other purposes, it is at his peril. He has agreed *that, when the event has happened, he should be in the same position as if he still held the amount deposited for the plaintiff's use. There is hardly any case of an action for money had and received in which the plaintiff is entitled to the same moneys or specie which the defendant has received.

The same reasons which entitle the plaintiff to recover the deposit for the 500 shares equally apply to the 750 of which he obtained an allotment subsequently in his own name. It is clear that he made the deposit for these on a similar undertaking by the defendant to return it.

The third objection related to the stamp on the undertaking contained in the circular, which was given up on the argument before us. Such an objection could not be raised on a special verdict.

The fourth objection was, that the plaintiff could not recover in respect of the 750 shares subscribed for by Dr. Elliott and Messrs. Fielder and Barnes: and the question referred to us by the jury on the special verdict is, whether that objection was a bar, as to that part of the plaintiff's demand. On referring to the verdict, we find ample ground to say that he could recover those deposits, because the plaintiff paid them all himself with his own money, though letters of allotment accompanied by the circular were sent to them at his request, and, as his nominees, they executed the Parliamentary and subscribers' contract, and the defendant knew that they were merely formal and nominal parties. These circumstances, all stated in the special verdict, form abundant evidence that the promise of the defendant to refund was made to the plaintiff in point of law, though, *the circular being sent to them, the promise may be considered to be made in fact to Messrs. Elliott, Fielder and Barnes, in whose names the scrip was to be issued if the plaintiff required scrip, and they would have in that case to execute the deed, as they did in their own names. Therefore the answer we must give to the question of the jury is, that the plaintiff can recover, upon the evidence, the deposit on the 750 shares allotted to Messrs. Elliott, Fielder and Barnes.

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The only remaining question is whether the letter of the 18th December, 1846, to the defendant and other directors, requiring payment of the deposit of 1*l.* 2*s.* per share on 1,890 shares, is a sufficient demand of payment under stat. 3 & 4 Will. IV. c. 42, s. 28, to entitle the jury to give the plaintiff interest on those deposits. Whether the jury did right in awarding interest in such a case, or

at such a rate of interest (5*l.* per cent.), being above the current rate of interest at the time, is not a question for us. We concur with the opinion of the Court of Queen's Bench (though I must add that I believe my brother MAULE, as well as myself, have some doubts upon that point), that it is a sufficient demand of payment in writing, and, though informal, and not in the words of the statute, it does sufficiently give notice to the defendant that interest will be claimed from the date of such demand until the time of payment, though it asks interest for a time prior to that date.

Therefore the judgment of the Court of Queen's Bench will be affirmed.

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Judgment affirmed.

IN THE QUEEN'S BENCH.

REG. *v.* OVERSEERS OF MANCHESTER (1).

(3 EL. & BL. 336—341; S. C. 2 C. L. R. 974; 23 L. J. M. C. 48; 18 Jur. 267.)

The treasurer of a county court was lessee, under stat. 9 & 10 Vict. c. 95, s. 48 (2), of a building used for the Court-house, and for other purposes of the Act, exclusively:

Held, that neither the treasurer, nor anyone else, had such an occupation of the building as to be liable in respect thereof to poor rate, under the Poor Relief Act, 1601 (43 Eliz. c. 2).

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[3 EL. & BL.
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On appeal by H. T. Hulton, treasurer of the County Court of Lancashire holden at Manchester, against a rate for the relief of the poor of the township of Manchester in Lancashire, the Sessions amended the rate by striking out the whole of the assessment after mentioned, subject to a case of which the material parts were as follows.

The premises rated consist of a building situate within the township of Manchester, called the County Court of Lancashire, holden at Manchester, of which the appellant is to be deemed the person liable to be rated if any person or persons whatever is or are liable to be rated in respect thereof.

The following is a copy of the assessment appealed against, so far as material to the question decided.

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Name of Owner	Name of Occupier.	Description of Property rated. Nicholas Croft.	Gross Estimated Rental.	Rateable Value.
Sir Oswald Mosley.	H. T. Hulton.	County Court.	£200.	£166.

(1) *Coomber v. Berkshire JJ.* (1883) (2) Repealed: 51 & 52 Vict. c. 43,
9 App. Cas. 61, 53 L. J. Q. B. 239, 50 s. 188.
L. T. 405.

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Of the grounds of appeal, the 3rd, 4th and 5th only are material. They are as follows.

“Third: That the premises, for or in respect of which I am rated and assessed as above mentioned, are used for public purposes only: and that I am not a beneficial occupier thereof.

“Fourth: That the said premises” “are not by law liable to be rated or assessed in and by the said rate or assessment; inasmuch as they are used for the sole purpose of transacting the business of a county court, established and carried on under and according to the provisions of an Act” &c. (9 & 10 Vict. c. 95).

“Fifth: That the said premises” “are not by law liable to be rated to the relief of the poor of the said township.”

It is to be taken as admitted: That the said building is rented exclusively for the purpose of transacting the business of a county court, established and carried on under and according to the provisions of stat. 9 & 10 Vict. c. 95. That the appellant is treasurer of the said county court, under the provisions of the said Act. That the appellant, as such treasurer, has been and is the lessee of the said building in trust for the purposes of the said Act of Parliament, according to the provisions of the 48th section thereof. That all fees received by the officers of the said county court are duly disposed *of according to the provisions in that behalf of the said Act. That the appellant is in no way connected with or interested in the said building except as aforesaid.

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That the district of the said county court includes other townships besides the township of Manchester, and, amongst others, the following townships, namely Manchester, Ardwick, &c. (naming 28 others).

If this Court shall be of opinion that either the appellant or any person or persons whatever is or are liable to be rated in respect of the said premises, then the said order of Sessions amending the rate is to be set aside, and the rate is to be confirmed: if otherwise, the same order to stand confirmed, and the rate to be amended accordingly.

Cowling, in support of the order of Sessions:

The building is used for public purposes only: there is no beneficial occupier. Its utility is confined to the litigants subject to the jurisdiction. By stat. 9 & 10 Vict. c. 95, ss. 2, 56, districts are to be assigned for which county courts are to be held, and the Judge is to hold them in the district at such places as the Crown shall have

ordered. By sect. 48 the treasurer, appointed under sect. 23 by the Commissioners of the Treasury, and paid by salary out of the Consolidated Fund, is, when necessary, to hire or otherwise provide messuages and lands fit for holding the Court and for the offices thereof; and they are vested in him "in trust for the purposes of this Act." By sect. 51 he may borrow money, to be repaid out of the general fund provided by the Act, under sect. 52, from the Court fees. There is nothing to make a beneficial occupation by any one.

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(The Court then called on the other side.)

Pashley, contra :

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It cannot be said that the property is of no value to any one: the actual litigants, perhaps all entitled to have recourse to the Court, are benefited by the building. It is the common case of a trustee rated for a beneficial cestui que trust.

(LORD CAMPBELL, Ch. J. : But must not the benefit be pecuniary, or something of the kind, something specifically profitable?)

It is not necessary that the trustee himself should have a beneficial interest: *Birkenhead Dock Trustees v. Birkenhead Overseers* (1); nor that the parties ultimately benefited should have a specific pecuniary interest: *Reg. v. Wallingford Union* (2), *Governors of the Bristol Poor v. Wait* (3). The last two cases cannot be distinguished from the present, for there can be no distinction between the benefit accruing to a particular body of ratepayers and that accruing to all resident within the local limits of a particular jurisdiction. A fund is provided, from the fees of the Court, out of which the expenses of cleaning, lighting and warming the Court-house are defrayed: sect. 55.

(WIGHTMAN, J. : If any liability to the rate could be shown, the rate might be defrayed out of that fund: that is all.)

Lord CAMPBELL, Ch. J. :

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I can find no enactment making any one liable in respect of those premises: possibly such an enactment might have been politic: but, in the absence of any such, it must be shown that the trustee has an occupation beneficial either to himself or to others for whom he is trustee. *Mr. Pashley*, I think, can scarcely have meant to

(1) 95 R. R. 475 (2 EL. & BL. 148).

(3) 44 R. R. 370 (5 Ad. & EL. 1).

(2) 10 Ad. & EL. 259.

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argue seriously that such a benefit exists in respect of the fees paid by the suitors and applicable to the hire of the Court, and to the keeping it in a fit state for being used. That benefit is quite unconnected with any occupation. Who then are the cestui que trusts? Surely the Queen's subjects in general cannot be so considered, as deriving a specific benefit. I find no person occupying beneficially within stat. 43 Eliz. c. 2, and am therefore of opinion that there is no liability to rate.

COLERIDGE, J. :

I am of the same opinion. It is not material whether the premises were rateable before they were used in this way: we are to look to the nature of the present occupation. The present occupier is the treasurer. Does he occupy beneficially for himself? The litigants do not occupy at all. Beneficial occupation exists when something is raised which, to some extent, is enjoyed by the occupiers: but there is nothing of the sort here: and that is what distinguishes the case from *Reg. v. Harrogate Commissioners* (1) and others which have been mentioned.

WIGHTMAN, J. :

[*341] I am of the same opinion. *Mr. *Pashley* has not shown that any one derives any profit at all as occupier: and the case therefore is not within stat. 43 Eliz. c. 2.

(No fourth Judge was present.)

Order of Sessions affirmed.

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REG. v. BENNETT.

(3 EL. & BL. 341—346; S. C. 2 C. L. R. 977; 23 L. J. M. C. 39; 18 Jur. 311; S. C. nom. *R. v. East Dean Overseers*, 22 L. T. O. S. 258.)

Stat. 11 & 12 Vict. c. 110, s. 3(2) (which enacts that the costs incurred for paupers rendered irremovable by the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), shall, when the parish is comprised in an union formed under the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), be charged to the common fund of that union), is inapplicable to the case of a pauper who is irremovable by his having no known settlement, although he has resided without interruption for five years, so as to be irremovable if settled elsewhere.

DOWDENWELL, in last Term, obtained a rule calling on the prosecutor to show cause why the allowance of Edward Murrell, Esquire, auditor of the Gloucestershire and Monmouthshire Poor

(1) 15 Q. B. 1012.

(2) Repealed: S. L. R. 1875.

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Law Audit District, of the sum of 2*l.* 8*s.* 9*d.*, 54*l.* 13*s.* 8*d.* and 18*l.* 11*s.* 7*d.*, charged in the accounts of the Westbury-upon-Severn Union, in Gloucestershire (brought up by *certiorari*), should not be quashed or disallowed, and why the said sums should not be paid to the said common fund by the township of East Dean in the said union. On notice to the auditor and the overseers of East Dean. By the affidavits on which the *certiorari* was obtained it appeared that the extraparochial parts of the Forest of Dean, in Gloucestershire, were, previously to 1842, wholly exempted from the operation of the statutes for the relief of the poor, and no provision existed for the maintenance or settlement of the poor therein. That by stat. 5 & 6 Vict. *c. 48 (1), the extraparochial parts of the Forest of Dean were divided into two townships, by the names of East Dean and West Dean; and that, by sect. 2, it was enacted, that each of the said townships should thenceforth and for ever, from and after the passing of the said Act, maintain its own poor, and, for the purposes of the Act, be vested with such and the like powers, privileges and immunities, and be subject to the same laws, authorities and regulations, as other townships in England and Wales maintaining their own poor. That, pursuant to the said Act, afterwards, in 1843, the Poor Law Commissioners added the said township of East Dean to the said Westbury-upon-Severn Union (2). That Thomas Dawe, a pauper, was born in that extraparochial part of the Forest of Dean called the township of East Dean, in 1821, and had never gained a settlement in any other township, parish or place; and that he had never gained a settlement in that township. That he had lived and inhabited in the same part of the Forest of Dean the whole of his life, and, whilst so inhabiting, had become and been, with his wife and family, chargeable to and relieved with out-door relief by the township of East Dean, during the half year ended 25th day of March, 1853. That his father and mother were inhabitants of, and resided, so far as could be ascertained, in the same extraparochial part of the said Forest; and that there was no evidence, and it could not be ascertained, that either of them, or any of their parents, had ever obtained *or were entitled to any settlement in any parish or place whatsoever. That the sum expended by the said township of East Dean in the out-door relief of the said Thomas Dawe during the said half year

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(1) "To provide for the relief of the poor in the Forest of Dean and other extraparochial places in and near the hundred of Saint Briavel's in the county of Gloucester."
(2) Sect. 3.

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ended 25th day of March last amounted to 2*l.* 8*s.* 9*d.*, and that sum formed part of and was included in the item of 363*l.* 9*s.* 4*½d.* charged in the book of account of the said union to the common fund of the said union.

That Joseph Bennett and two others, being guardians of the poor of the parish of Westbury-on-Severn, forming part of the said union, and ratepayers of the said parish, objected on the audit to the said charge of 2*l.* 8*s.* 9*d.* to the said common fund, contending that it should be charged to the township of East Dean.

The affidavit also set out objections made in respect of various sums which were disbursed for the relief of other paupers residing in East Dean, and which were charged by the auditor to the common fund of the union under the same circumstances. Notice of application for the *certiorari*, on these grounds, had been given to the auditor. The auditor returned the items; and added that his reason for allowing them, stated and declared in the book of accounts, was: "Because the said Thomas Dawe and the said other poor persons, having resided in East Dean more than five years before they were relieved as above mentioned, had not been settled in such township, were in my judgment irremovable therefrom, by reason of an Act," &c. (9 & 10 Vict. c. 66); "and therefore, and also because it did not sufficiently appear, nor was it shown to me, that the said Thomas Dawe and the said other poor persons had not respectively settlements either by themselves or derived by them respectively in some parish or township *other than the said township of Dean, that the costs incurred in their relief were properly chargeable to the common fund of the said union by virtue of the 3rd section of the 11th & 12th Victoria, chapter 110."

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Alexander and *Phipson*, for the auditor, and *R. Hall*, for the township of East Dean, now showed cause :

The sums in question were properly charged upon the common fund of the union. Stat. 11 & 12 Vict. c. 110, s. 3, enacts that, after 30th September, 1849, all the costs incurred in the relief of a pauper who, "not being settled in the parish where he resides, shall, by reason of some provision of" stat. 9 & 10 Vict. c. 66, "be or become excepted from the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any" union founded under stat. 4 & 5 Will. IV. c. 76, "be charged to the common fund of such union." Now it is clear that the paupers never were settled in East Dean, their place of residence,

which was extraparochial until the passing of stat. 5 & 6 Vict. c. 48; the question, therefore, is, Whether, having no settlement in the parish in which they reside, they are, further, irremovable under stat. 9 & 10 Vict. c. 66?

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(LORD CAMPBELL, Ch. J.: Is it contended on the other side that they do not belong to the category of the irremovable, but rather of the unsettled?)

There appear no grounds for such an objection. The auditor states, in his return to the writ, that no evidence was laid before him to show that they had no settlements elsewhere.

(COLERIDGE, J.: According to your argument, the expenses incurred in the relief of all paupers who have resided for five years in East Dean, and have no settlement elsewhere, would be chargeable upon the common fund *of the union.)

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The argument certainly goes to that extent.

(LORD CAMPBELL, Ch. J.: The irremovability referred to in stat. 11 & 12 Vict. c. 110, s. 3, is only irremovability under the provisions of stat. 9 & 10 Vict. c. 66. Does the present case come within the latter statute?)

It would appear to do so: it cannot be contended that the rules laid down in that statute as to irremovability are not to apply except where the place of settlement is known.

(COLERIDGE, J.: A pauper is removeable from a parish, not because he is not settled in that parish, but because he is settled in another.)

Pashley and Dourdeswell, contra, were stopped by the Court.

LORD CAMPBELL, Ch. J.:

The attempt to throw these expenses upon the common fund of the union is very unjust. The expenses incurred in the relief of paupers who are not settled in the parish in which they reside are chargeable upon the common fund of the union only where the paupers are irremovable under stat. 9 & 10 Vict. c. 66. Here they are irremovable, but not by reason of that statute; they are irremovable without it. The auditor was clearly wrong in his decision; and the rule must be made absolute.

REG. COLERIDGE, J. :

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I am of the same opinion. The whole question here is whether the auditor has construed stat. 11 & 12 Vict. c. 110, s. 3, rightly. I think it is clear that the present case is not within that statute. Would the paupers here have been removeable to some other place, but for an uninterrupted five years' residence? Clearly not; and therefore the auditor was wrong in *charging the expenses incurred in their relief to the common fund of the union.

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WIGHTMAN, J. : The Act clearly does not apply.

(No fourth Judge was present.)

Rule absolute, with costs to be paid by the overseers of East Dean.

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GAMBIER v. OVERSEERS OF LYDFORD (1).

1854.
Jan. 25.

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3 EL. & BL. 346—362; S. C. 2 C. L. R. 951; 23 L. J. M. C. 69; 18 Jur. 352.)

Under the Convict Prisons Act, 1850 (13 & 14 Vict. c. 39), the directors of convict prisons hired land and buildings, to be used as a convict establishment for the confinement and employment of convicted prisoners.

Part of the lands were occupied as a prison, a building within which prisoners were confined, and within which were also a house and garden occupied by the governor, and also dwellings occupied by other officers of the establishment; no more was occupied by the governor or officers than was necessary for the proper discharge of their duties and the adequate accommodation of their families. The directors assigned the houses, &c., to them; and they had no discretion in this respect: Held, that no one was rateable in respect of the prison or any other of the matters above mentioned.

Within the precincts of the prison was a coach-house and stabling, occupied by the governor, of an extent greater than was necessary to enable him to perform his duties: Held, that the governor was rateable in respect of this excess.

Within the precincts was a building occupied as a canteen for the sale of beer to the prison officers. No profit was derived therefrom beyond what was sufficient to pay the wages of a man who supplied the beer: Held, that the occupier was rateable.

Outside the precincts, but in the same parish, were buildings occupied by the chaplain of the prison, by the medical officer, and persons employed in the prison: none occupied more than was necessary for the discharge of their duties and the adequate accommodation of their families. The dwellings were assigned to them by the directors; and they had no discretion as to their place of residence: Held, that these occupiers were

(1) Approved: *Martin v. West Derby Assessment Committee* (1883) 11 Q. B. [1891] 1 Q. B. 339, 60 L. J. M. C. D. 145, 52 L. J. M. C. 66; *Showers v. Chelmsford Assessment Committee* 55, 64 L. T. 755.

rateable. Per Lord CAMPBELL, Ch. J. and WIGHTMAN, J.; *dissentiente* COLERIDGE, J.

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Part of the premises outside the prison were occupied by a grocer, who supplied goods to the residents of the convict establishment and others, on his own account: Held, that the occupier was rateable.

Part of the premises consisted of land outside of the prison, within the same parish; upon this the convicts were employed; and the proceeds were disposed of exclusively for the benefit of the establishment: Held, that the occupation of such land imposed a liability to poor rate.

On 8th April, 1852, a rate for the relief of the poor of the parish of Lydford in the county of Devon *was made, in which James Mark Gambier, Esquire, the governor of the Convict Prison at Dartmoor in the said county, was rated and assessed as follows.

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The case set out the entry: the only material parts were the following.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Gross estimated Rental.			Rateable Value.		
Governor of Convicts.	Prince of Wales.	Land and Buildings.	Rundlestone.	£	s.	d.	£	s.	d.
				30	0	0	20	0	0
The Governor of Convicts.	Government, or Prince of Wales.	Land and Buildings.	For the whole of the Property rented by the Government of the Prince of Wales, consisting of houses, barracks, Prison of War offices, and land on Dartmoor.	...	...	...	280	0	0

Gambier having appealed against the rate to the Sessions, and notice of such appeal having been given, a case was, by consent of parties, and by order of ERLE, J., stated for the opinion of this Court, pursuant to stat. 12 & 13 Vict. c. 45, s. 11.

The material parts of the case were as follows.

The "land and buildings" secondly mentioned in the assessment are rented by the directors of convict prisons from the Duchy of Cornwall, under a lease dated 31st December, 1852, for a term of ninety-nine years from 29th September, 1850, subject to a yearly rent of 234*l.* 10*s.*, and, after the expiration of the first twenty-two years of the said term, subject to certain additional rents for the land which should have been brought into cultivation, and subject also to certain royalties on peat, &c. which should be raised or gotten, and which, or the products of which, should be carried off the

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premises whether for sale or otherwise : which lease was granted on the surrender of a former lease of 30th June, 1851.

The lease of 31st December, 1852, states that the buildings and part of the waste land thereby demised are to be used as a convict establishment, for the confinement and employment of convicted prisoners, in (among other occupations) the reclaiming and cultivating the lands thereby demised, pursuant to covenants therein contained, and for purposes connected therewith, and contains a covenant by the lessees to use all the premises thereby demised as and for a convict establishment and purposes connected therewith, and not for any other purpose whatsoever, unless with the consent of the lessor. * * *

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The prison and buildings connected therewith have been used by the directors as a convict establishment, pursuant to the terms of the lease of 30th June, 1851, from the commencement of the said term until the surrender of that lease, and thenceforth to the present *time, pursuant to the terms of the said mentioned lease : and the land included in both the existing leases has during all that time been occupied by the directors, together with the prison ; and the convicts have been employed in the improvement and cultivation thereof ; and about fifty acres have been brought into a good state of cultivation ; and more is in the course of being reclaimed and cultivated. The cost of the improvements and cultivations necessary to fit the establishment for the reception of convicts, and of the erection of all new buildings, have been paid out of the Home Office convict estimates.

The rent and taxes (including property tax, highway rates, tithes and poor rates), and also the salary of the governor, which has been fixed at 500*l.* per annum, have been and are paid out of the same fund.

The produce of the land (part of which has been converted into a kitchen garden for the use of the establishment) is either consumed in the establishment or sold ; the amount received from such sales being placed to the service of the prison expenditure, thus reducing the amount drawn from the convict estimates. The peat dug from off the land is consumed as fuel in the prison, and also in the manufacture of gas for prison consumption. No part of the produce of the land has been sold or disposed of otherwise than as above mentioned.

A house within the precincts of the prison, and a small strip of land occupied therewith as a garden, have been assigned to and are

occupied by the governor of the prison, as “quarters,” together with stables, coach-house and outbuildings used for the governor’s house, two ponies, and pony carriage. The governor is required *by the Secretary of State to keep one horse for use on the public service. The governor’s house consists of a drawing room, a dining room, a kitchen, four bed rooms, and two attics. The quarters occupied by the deputy governor, the assistant chaplain and the steward, each containing a somewhat less number of rooms than the governor’s quarters, are also situate within the precincts of the prison, and are occupied by those officers respectively. All the above quarters are occupied rent free.

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At some little distance from the building of the prison, and not connected with it by boundary wall, or otherwise, is a row of eight cottages, which, if rateable, ought to be assessed at 90*l.* a year. Persons employed in the prison occupy these cottages; and for some of them the occupiers pay rent; and in other cases the value of the occupation is taken into account and diminishes the wages paid to such occupiers.

Near these cottages, and also unconnected with the building of the prison, is a dwelling-house, of a rateable value of 20*l.* a year, occupied by the “medical officer” of the establishment.

And, at a little distance from this house, is a house and garden occupied by the chaplain of the establishment; and, if rateable, is of the rateable value of 35*l.* a year.

In addition, a great part of a building called “the barracks,” situate at a short distance from the prison, has been assigned as quarters for the subordinate officers and their families: and another part of these barracks is occupied by a grocer, who resides and carries on his business there on his own account, supplying goods to the residents in the convict establishment, and to others who deal with him. The last mentioned officers or *some of them pay rent for their quarters to the directors; whilst in other cases it is calculated in their wages similar to the cottages in the row. Each officer occupies one or two rooms according to the number of his family.

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No more rooms are occupied by the governors or by the other officers than are necessary for the proper discharge of their duties as officers of the prison, and for the adequate accommodation of the families of such of them as are married men and have families. But the coach-house and extent of stabling of the governor are not necessary to enable him properly to discharge his duties. The several officers, however, have no discretion in respect of the houses

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and apartments assigned to them, respectively; such houses and apartments being so assigned by the directors of prisons for their occupations as such officers.

A part of the building within the prison walls is occupied as a canteen by one Samuel Piper, for the sale of beer to the prison officers, no profit being derived therefrom beyond what is sufficient to pay the wages of a man who supplies the beer.

All the rents which are paid by any of the officers, and the proceeds of the land, are placed to the service of the prison expenditure, thus reducing the amount drawn from the convict estimates.

The land and buildings demised by the said lease contains in the whole thirty-three acres, or thereabouts.

The land and buildings called Rundlestone are situate apart, and at a distance of half a mile from the prison and barracks before mentioned, and consist of 8 acres of meadow land, worth a yearly rent of 1*l.* 5*s.* per acre, 50 acres of rough land, worth a yearly rent of 5*s.* per *acre; and 145 acres of waste land, worth a yearly rent of 1*s.* per acre; and of a small farm house: and these premises are rented by the directors of convicts' prisons from the Duchy of Cornwall, under a lease dated 7th May, 1852, for a term of thirty-one years, from 29th September, 1850, subject to a rent of 30*l.* a year, and to certain royalties for all peat &c. which, or the products of which, should be sold, or disposed of otherwise than for the use of the convict establishment. The directors employ convicts of the establishment in clearing and cultivating this farm; and all its proceeds have been used or disposed of for the benefit of the establishment and not otherwise.

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The question for the opinion of this Court was stated to be:

Whether, under the circumstances above stated in respect of the "land and buildings" included in the rate, or any and what part thereof, any person is rateable to the relief of the poor. If the Court shall be of opinion that no one is rateable to the relief of the poor in respect of the occupation of any part of the said land and buildings, then it is agreed that the said rate shall be amended by striking out the assessment on the appellant. If the Court shall be of opinion that, in respect of the occupation of the said lands and buildings, or any part thereof, any one is rateable as aforesaid, then the assessment on the appellant is to stand to such extent as the Court may think fit: and, if the parties should differ as to the amount at which the rateable part of the said lands and buildings ought to be assessed, the question of such amount shall be disposed

of by the Court itself naming a sum, or otherwise as the Court may direct.

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In either case such costs are to be paid as this Court shall adjudge: and it is agreed that judgment shall be entered by the Sessions accordingly.

Pashley, for the respondents:

First, as to the prison. It is found that the coach-house and extent of stabling, occupied by the governor within the walls, are "not necessary to enable him properly to discharge his duties." The governor therefore is a rateable occupier: *Rex v. Terrott* (1). And, as he occupies the whole together, he must be rated for the whole, as in that case. Indeed it is not necessary to rely upon the excess, in order to show that he is rateable for all that he occupies in the prison. In *Reg. v. Temple* (2) it was held that premises, hired by the Privy Council for the use of a normal school, on which the principal and masters resided, were subjects of rate.

(LORD CAMPBELL, Ch. J.: There is a difference of use, at any rate, in the two cases. There the parties went voluntarily for instruction: here the building is devoted to persons suffering the sentence of the law.)

The Court has repeatedly, as in *Reg. v. Sterry* (3), expressed regret that the mere occupation of valuable property has not, without any distinction as to public and private purposes, been deemed sufficient to constitute a rateability.

(COLERIDGE, J.: It may be said that such an expression of regret shows how strongly it was felt that the objectionable rule was fixed.

LORD CAMPBELL, Ch. J.: You had better clear the way by discussing, in the first place, the question whether any one is rateable for that which is mere prison.)

Any one who occupies is so.

(LORD CAMPBELL, Ch. J.: *What profit does the prison produce?)

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The case is like that of a lunatic asylum, which is rateable in the hands of a private person, or of the normal school in *Reg. v.*

(1) 7 R. R. 502 (3 East, 506).

(3) 54 R. R. 546 (12 Ad. & El. 84,

(2) 95 R. R. 484 (2 El. & Bl. 160).

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Temple (1). The Privy Council, in the case last mentioned, were much in the same position as the directors here, under stat. 13 & 14 Vict. c. 39. The latter are not servants of the Crown, but “public officers appointed to perform certain duties assigned to them by the Legislature,” according to the distinction laid down by Lord LYNTHURST, L. C. in the case of *The Commissioners of Woods and Forests* (2). * * *

[355] At all events, the governor is rateable so far as the occupation of the coach-house is not necessary for the discharge of his duties : *Reg. v. Terrott* (3).

The rateability in respect of the occupation of the house by the grocer will probably not be contested.

[*356] As to the cottages and other dwellings, including the barracks, on the outside of the prison : the occupiers, though they reside for the purpose of discharging duties in the prison, are beneficial occupiers, as much as they *would be if the dwellings were in a parish different from that in which the prison stands. Whether they pay rent, or have the amount of rent deducted from their salary, must be immaterial as to rateability.

(COLERIDGE, J. : Is the case different from that of a gamekeeper who is allowed to occupy a house, in lieu of part of his wages, and who yet, if he occupies merely for the purpose of performing the service of gamekeeper, is held not to be an occupier, the occupation being that of the master ?)

The question is whether there is here an occupation under stat. 43 Eliz. c. 2. The case of the chaplain is a fair instance : how can he be said not to occupy beneficially, because he is obliged to reside near the prison ?

The canteen is unquestionably the subject of beneficial occupation.

As to the land, there is nothing to show that it does not produce profit. The case therefore falls within *Governors of the Bristol Poor v. Wait* (4). It can make no difference whether the land is occupied in this way, or whether the directors let it to a farmer who contracts to employ convicts upon it.

Sir A. J. E. Cockburn, Attorney-General, contra :

As to the prison itself, the exemption from rate is established by

(1) 95 R. R. 484 (2 El. & Bl. 160). 306, 324).

(2) *Viscount Canterbury v. The* (3) 7 R. R. 502 (3 East, 506).

Attorney-General, 65 R. R. 393 (1 Ph. (4) 44 R. R. 370 (5 Ad. & El. 1).

Reg. v. Shepherd (1). And, so far as it is occupied by officers exclusively for the performance of their duties, they cannot be rateable: and this includes reasonable accommodation for their families according to their station in life.

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(LORD CAMPBELL, Ch. J.: That is so, certainly.)

With respect to the excess of accommodation enjoyed by the governor, it seems that *Rex v. Terrott* (2) is conclusive in favour of the rateability. [357]

It must be also admitted that the occupation by the grocer creates a liability to rate.

The occupation of the buildings by the officers without the prison, inasmuch as it is confined to such occupation as is essential to the proper performance of their duties, cannot in principle be distinguished from the occupation within the prison. The establishment requires the officers; and they are placed, without any intention on their own part, on premises belonging to the establishment. What difference can it make whether such premises are within or without the walls of the building principally appropriated to the purpose of confinement?

(LORD CAMPBELL, Ch. J.: Your principle would go to the extent of exempting them if these premises were in one parish and the prison in another.)

That is not an absurd result.

(LORD CAMPBELL, Ch. J.: I cannot see that it makes any difference whether the officers pay rent or have so much less salary.)

It certainly would make no difference as to premises occupied within the walls: and there can, in this respect, be no distinction as to premises within or without.

(COLERIDGE, J.: Suppose the directors to say to the chaplain, We require you to reside in such a street: would not he be the occupier of the house which he took, whether it was let to him by the directors or by any other person?)

As much so as if the apartments were within the prison; not more. In either case he would have an occupation sufficient to support an

(1) 55 R. R. 241 (1 Q. B. 170).

(2) 7 R. R. 502 (3 East, 506)

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action of trespass. All buildings *required as accessory to the prison seem to come within the same principle.

The authorities appear to show that the occupier of the canteen is rateable.

As to the land on which the convicts are employed, it is devoted, not to producing profit, but to carrying out the public purposes of the establishment.

(WIGHTMAN, J. : How do you distinguish the case from *Governors of the Bristol Poor v. Wait* (1) ?)

In that case the governors occupied, for the purposes of their parish, land out of the parish : here the parish is the same ; and, further, even if that were not so, the purpose is public, without restriction to parish or county.

(LORD CAMPBELL, Ch. J. : If they carried on a farm profitably, by means of convicts, in another parish, devoting the profits to the establishment, could the other parish be deprived of the rateable ground ?)

That is no more than what takes place in many changes of the mode of occupying.

(COLERIDGE, J. : As in the case of building a county gaol.)

There was in fact a profit from the work of the prisoners in *Reg. v. Shepherd* (2). But it must be admitted that the authorities of *Governors of the Bristol Poor v. Wait* (1) and *Reg. v. Wallingford Union* (3) are strongly in favour of the respondents, on this point.

Pashley, in reply, was desired by the COURT to confine his argument to the cases of the residences of the officers of the establishment :

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Rex v. Hurdie (4), the case of the *gunner, who occupied a battery house, the property of the Crown, goes further than is required for the respondents on this point. And in *Rex v. Terrott* (5) the COURT said : " The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or

(1) 44 R. R. 370 (5 Ad. & El. 1).

(4) 1 R. R. 765 (3 T. R. 497).

(2) 55 R. R. 241 (1 Q. B. 170).

(5) 7 R. R. 502 (3 East, 513).

(3) 10 Ad. & El. 259.

other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal and private respect, then he is not rateable." But it cannot be said that the officers, for whom a residence is found, derive no benefit from its use. In the case of the Masters in Chancery, *Holford v. Copeland* (1), the apartments were used merely for business.

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(LORD CAMPBELL, Ch. J. : The Masters could no more be rateable for that user than we are for sitting in this Court.)

But, if in either case a residence were annexed to the office, that would create a rateability.

LORD CAMPBELL, Ch. J. :

We are called on to give our opinion whether the whole or any part of these premises is the subject of rate. As to the prison, I entertain no doubt of its being exempt. Prisons have always been considered not rateable; the prisoners there confined are not beneficial occupiers; nor can the gaoler or other *officers, who are placed there to take care of the prisoners, be said to have a distinct occupation. Next: as to the occupation which the governor enjoys in excess of what is necessary for the performance of his duties. That excess being expressly found, he is to that extent not within the principle which exempts from rate an occupation necessary for the performance of a public duty. Next, the *Attorney-General* gives up the defence of the grocer's residence and the canteen. Then I come to the question of the official residences without the walls of the prison. I think the officers, in those instances, occupy beneficially, and are rateable. It cannot be disputed, I think, that they would be rateable if they paid rent for these houses, and received an allowance for the purpose of doing so. But I cannot see that it makes any difference whether they have a pecuniary allowance or a residence allotted to them: there is a benefit in each case; only the salary will be less in one case than the other, because the benefit is in a different form. It does, I allow, appear to be a subtle distinction, when we discriminate between the residences within the walls of the prison and those without: but, whenever we find ourselves on the confines of conflicting principles,

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the distinctions must inevitably be subtle. The officers are in the prison merely for the purposes of the prison: but, if we allowed the exemption without the prison, we should have to allow it in cases where the residence was in a different parish. I am therefore of opinion that there is a liability to rate in respect of these residences. No distinction can be made as to the cottages, whether they pay rent or not. The official houses in the barracks will also be within the liability. Lastly, the occupation of the land which is inhabited by the convicts brings with it a *liability to rate. The case cannot possibly be distinguished from *Governors of Bristol Poor v. Wait* (1); there can be no difference whether the dispute is between two parishes or between a parish and a county.

COLERIDGE, J.:

I agree with my Lord on all the points except one, to which I shall confine myself. As at present advised, I cannot concur in thinking the occupier of any official residence, which is not more than is requisite for the purposes of the office, rateable for such occupation: and I do not think it safe to say that the rule is different according as the residences are within or without the prison walls. Why is it that officers are not rateable for what they occupy within the walls? The directors occupy all within the walls by the prisoners and the officers: and this, not being a beneficial occupation, has in many cases been held not to be rateable. Then the fact here is that residences beyond the walls are allotted to officers which are absolutely necessary for the performance of their duties. They have no choice as to where they reside; they pay no rent. On the last circumstance, however, I do not rely much; for that would merely affect the amount of salary. The residences need not be within the walls; but they must be near: on what principle can we distinguish them from residences actually within the walls? If the governor's house were without the walls, I think it could no more be rateable than it is now: it would not the less be a part of the prison. It is found not to be more than is necessary for the performance of his duty in the prison; and that, on a fair view of the rule, includes reasonable accommodation for his family.

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WIGHTMAN, J.:

The question is, What part of these premises is rateable, or rather what is exempt from rate. It is hardly contended that the prison

itself is rateable, or that the governor is not rateable for the excess, which is found as a fact. As to the official residences without the walls, I think we may draw the line there; we certainly must draw it somewhere; either rent is paid, or there is an equivalent in the way of salary. The separate residences seem to me to fall within the ordinary rule as to beneficial occupation. On the other points, also, I agree with my Lord. The case of the convict farm is clearly not distinguishable from *Governors of Bristol Poor v. Wait* (1).

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(No fourth Judge was present.)

LORD CAMPBELL, Ch. J.:

There is no victor: and there will be no costs.

The following order was drawn up: "It is considered and adjudged by this Court: That the appellant is rateable in respect of all the lands and buildings assessed except the prison and the governor's house within the prison; and that the appellant is also rateable in respect of the excess of accommodation in the coach-house and stable within the prison: It is thereupon ordered that the rate do stand, except as aforesaid, and that the same be amended, and judgment entered accordingly by the Sessions."

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(3 El. & Bl. 363—371; S. C. 23 L. J. M. C. 100; 18 Jur. 696.)

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The rules of a Benefit Society, established, enrolled and certified under stats. 10 Geo. IV. c. 56 (2), 4 & 5 Will. IV. c. 40 (2), and 9 & 10 Vict. c. 27 (2), provided that, if any misunderstanding should happen between the Society and any of its members, the matter should be submitted to the decision of arbitrators according to stat. 10 Geo. IV. c. 56 (2), nine of whom should be elected in the first quarterly meeting after the passing of the said laws; and that, when any dispute should arise, the names of the arbitrators should be shuffled in a box or glass, and the first five names taken up by the complaining party should be the arbitrators for the question at issue, and their decision should be final.

The Society, at their first quarterly meeting, appointed a general committee for the purpose of electing arbitrators; and nine arbitrators were shortly afterwards elected. Afterwards, in consequence of some of them having left the neighbourhood, and of others having refused to act if called on, the general committee elected nine new arbitrators in the place of the first set. After the first election, but before the second, D., a member of the Society, was expelled for an infringement of one of the rules, as

(1) 44 R. R. 370 (5 Ad. & El. 1). See now the Friendly Societies Act,

(2) All the statutes referred to were repealed by 18 & 19 Vict. c. 63, s. 1. 1896 (59 & 60 Vict. c. 25), s. 68 (6).

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directed by the rule itself. He applied, after the second election of arbitrators, to have the question of his expulsion referred to arbitration. The Society appointed a day for that purpose; and D. and six of the arbitrators last elected attended. D. refused to draw five names out of the nine, according to the rule; and he eventually, with the consent of the Society, signed an agreement, submitting the dispute to five out of the six arbitrators then present (he having been previously allowed, on his own request, to reject any one of the six he chose); their decision to be final. The five arbitrators made their award, adjudging him to be properly expelled. D. applied for a rehearing, which was granted; but, upon the meeting for a rehearing, D. refused to select his arbitrators according to the rule; and he subsequently made a complaint before justices, under stat. 4 & 5 Will. IV. c. 40, ss. 7, 8 (1); and the justices made an order requiring the Society to reinstate him, or to pay him 50*l.*:

Held, that the justices had no jurisdiction to make such an order, there having been no neglect or refusal by the arbitrators to make an award, and it not being open to D. to contend that the application for settlement by arbitration had not been complied with in forty days, he being estopped, by the written agreement, from disputing the validity of the appointment of the arbitrators.

H. J. HODGSON, in last Hilary Term, obtained a rule calling on the prosecutors to show cause why an order, made by persons named in the rule, being five justices of Carnarvonshire, on 28th March, 1853, "upon the complaint of David Davies, whereby they did order Rowland Evans, as president and officer of the Bangor Rechabites Benefit Society, to reinstate the said David Davies as a member of the said Society, and, in default of his so doing, to pay the said David Davies the sum of 50*l.*, should not be quashed."

From the affidavits in support of the rule it appeared that the Bangor Rechabites Enrolled General Benefit Society was, in 1841, established and enrolled according to the provisions of stats. 10 Geo. IV. c. 56, and 4 & 5 Will. IV. *c. 40. The rules of the Society were duly certified as directed by those Acts; and were afterwards altered in 1849, and the rules, so amended, duly certified according to the provisions of stat. 9 & 10 Vict. c. 27. The 2nd rule required every person becoming a member of the Society to sign a pledge to abstain from every intoxicating beverage: and, by the same rule, it was declared that, if any member should break the said pledge, he should be no longer a member, unless the Society should choose to readmit him as a new member upon his paying a fine as specified in the said rules. The 40th rule provided that, should any misunderstanding happen between the Society and any of its members at any time thereafter, the matter should be submitted to the

(1) All the statutes referred to were repealed by 18 & 19 Vict. c. 63, s. 1. See now the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6).

decision of arbitrators according to stat. 10 Geo. IV. c. 56, nine of whom should be nominated and elected in the first quarterly meeting after the passing of the said laws, no one of them having any claim to any benefit from the Society; and that, when any dispute should arise, the names of the arbitrators should be written on a slip of paper and shuffled in a box or glass; and the first five names taken up by the complaining party should be the arbitrators for the question at issue; and that their decision should be final.

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In July, 1849, a general committee of the Society, previously appointed for the purpose at their first quarterly meeting, elected nine persons as arbitrators under the 40th rule. Some of these arbitrators having refused to act if called upon, and others having left the neighbourhood of Bangor, nine other persons, none of whom had any claim to any benefit from the Society, were, in June, 1852, at a general meeting of the Society, elected as arbitrators in the place of the nine arbitrators first elected. It was deposed that this was done for the *mere purpose of having a full number of arbitrators; and that, at the time of the election, there was no dispute between the Society and any member. In April, 1852, Davies had been expelled from the Society for having infringed the 2nd rule by breaking his pledge; and in September, 1852, he served a notice upon Evans, then president of the Society, requiring the Society to submit the question of his expulsion to arbitration. A meeting was appointed for that purpose by the president and the committee, and notice given to Davies. On the day appointed, six out of the nine last elected arbitrators attended, the other three being in readiness to attend in case their names should be drawn. Davies also attended. The names of these nine arbitrators were written by the president upon slips of paper, and shuffled in a box, as directed by the 40th rule. Davies was then requested to take five names out of the box; but he refused, and proposed, instead, to submit the dispute to five out of the six arbitrators then present, he being allowed to reject which one of the six he should choose. The president and the committee assented to this; and Davies selected five of the arbitrators. The following agreement was then signed, at the meeting, by the president and Davies.

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“Memorandum of agreement made and entered this 6th day of October, 1852, between David Davies of Lonyobty,” &c., “of the one part, and Rowland Evans, of ” &c., “on behalf of the Bangor Rechabites Enrolled General Benefit Society, of the other part: Whereas

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certain dispute has arisen between the said David Davies and the said Society as to the expulsion of the said David Davies from the said Society, it is witnessed that the said David Davies and Rowland Evans do hereby agree to refer such dispute to the arbitration *and decision of the following gentlemen" (here followed the names of the five arbitrators chosen by Davies), "whose decision shall be final and conclusive between the said parties hereto. As witness" &c.

Davies's statement, in his affidavit in answer, as to his signing this agreement, was as follows. "That this deponent thought he was bound to submit the case to them, and accordingly did so. That, before the case was gone into, he, deponent, was told by Mr. Henry Lloyd Jones, one of said persons so acting as arbitrators as aforesaid, that he must sign a paper agreeing to abide by the decision which should be come to, and that the case could not be entered into until he did so; that, said H. L. J. being an attorney, he, deponent, supposed that it was required by law that such a document should be signed, and he therefore signed" the paper: "that said Henry Lloyd Jones did not, either directly or indirectly, state to deponent or in his this deponent's hearing, that his object in getting the said agreement signed was to prevent any dispute arising as to the sufficiency of the appointment of the persons about to act as arbitrators; nor did he, this deponent, propose or consent to refer the dispute in question to any of the arbitrators who were then present; nor did he select or agree to any of them for that purpose, except by signing the said paper."

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The affidavits in support of the rule further showed that, immediately upon the signing of the agreement, these five arbitrators proceeded with the reference, and, on the same day as that on which the meeting was called, published their award, in the following terms. "We, the major part of the arbitrators duly appointed by the Bangor Rechabite Enrolled General Benefit Society, established at Bangor, in the county of Carnarvon, do hereby *award and order that we expel David Davies, of Lonypobty, from the said Society. Dated" &c. A copy of the award was served on Davies; who, on 18th January, 1853, served on the president the following notice.

"Mr. Rowland Evans, president of the Bangor Rechabite Benefit Society; I give you this notice, to bring my case of being expelled from the Society before the arbitrators with fair play, that I may get satisfaction; or I will bring my case to the magistrates. Bangor, 18th January, 1853."

The president and the committee sent a notice to Davies, that they were willing to consent to another reference, and that the said arbitrators would meet on 25th February, 1853, for the purpose of rehearing the case; and they requested Davies to attend. The meeting took place on that day; and the last elected arbitrators and Davies attended. The president wrote the names of the nine arbitrators on slips of paper, preparatory to placing them in the box to be shuffled; but Davies then stated that he would not proceed with the reference, and left the room. No other application for a rehearing was afterwards made by him.

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On the 15th March, 1853, Davies made a complaint before the magistrates at the Bangor Petty Sessions, against Evans, as president of the Society, stating the fact of his, Davies's, expulsion, and of his first application for a reference to arbitration, and further stating that such application had not been complied with within forty days next after such application. Before the magistrates, the facts above stated were proved; and it was contended, on behalf of the Society, that the magistrates had no jurisdiction in the matter, Davies having applied to the Society for a reference to arbitration, and an award having been accordingly made, *within forty days from such application; which, by the terms of the submission, was to be final. On behalf of Davies it was contended that no binding award had been made, inasmuch as the arbitrators who had made it were not arbitrators appointed according to the rules of the Society. The magistrates "decided upon entering into the merits of the said dispute, without assigning any reasons for arriving at that conclusion:" and they accordingly made the order in respect of which the rule above mentioned was obtained.

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Bramwell and Willes now showed cause against the rule:

The justices had jurisdiction to make the order in question. Stat. 4 & 5 Will. IV. c. 40, s. 7, gives them jurisdiction either when the application for a settlement by arbitration has not been complied with within forty days after such application, or where there has been an absolute neglect or refusal on the part of the arbitrators to make an award. The justices are not bound, in making their decision, to state the grounds upon which they make it. But in the present instance, no doubt, they were of opinion that the second appointment of arbitrators was not made *bonâ fide*. Any proceeding of the arbitrators, under an invalid or fraudulent appointment,

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would be void, and tantamount to a refusal and neglect on their part to make a valid award. And a reference to such arbitrators is no compliance, legally speaking, with the application for a settlement by arbitration. It is clear that here the second appointment was merely a colourable one; it was made *post litem motam*, and was obviously for the purpose of obtaining a set of arbitrators favourable to the Society. But, even assuming that it was made *bonâ fide*, it was not made in accordance with the provisions of the rules of the Society and stat. 10 Geo. IV. c. 56, s. 27; and *the award was therefore not valid.

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(COLERIDGE, J.: Suppose the Society, under a misapprehension, removed one body of arbitrators, and substituted another. Would any decision by these new arbitrators be invalid?)

It is not necessary to go so far: in the present case the first arbitrators were not regularly removed; and it is clear, at all events, that, while they remain unremoved, no fresh arbitrators can be appointed, and that, if they are appointed, their decisions are not valid.

(LORD CAMPBELL, Ch. J.: The appointment of the second set of arbitrators would amount to a removal of the first.

WIGHTMAN, J.: Suppose some of the first set left the neighbourhood: could the Society, without removing them by a formal act, supply their places by others?)

The leaving would be tantamount to a refusal to act; and there would therefore be no necessity for a formal act of removal. It will be contended by the other side that Davies was bound by the written submission. But that submission is invalid for want of mutuality: this objection, in fact, applies to the whole of the transaction.

(COLERIDGE, J.: In order to give the justices jurisdiction, it must be shown either that no award at all was made, or that an award was made which was invalid. How can either state of things exist here, where an award has been made to which Davies agrees beforehand to submit, as binding?)

He signed the agreement under a misapprehension; he did not know what he was assenting to.

(COLERIDGE, J.: The affidavits tend to show that he signed the agreement with a full knowledge of its purport.)

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His own affidavit states that he did not.

(WIGHTMAN, J.: His denial is not very explicit.

COLERIDGE, J.: Suppose the award had been against the Society: could they have applied for a magistrate's order, on the ground that *no valid award had been made?)

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It would appear that they could.

(LORD CAMPBELL, Ch. J.: What is the latest case on this point?

H. J. Hodgson, contra, mentioned *Reg. v. Grant* (1).)

Cowling and *H. J. Hodgson, contra*, were not called on.

LORD CAMPBELL, Ch. J.:

This rule must be made absolute. If the justices had thought that the second appointment of arbitrators was fraudulent, no doubt they would have had jurisdiction to make the order. But there is no evidence to show that they did, or that they had any grounds for so thinking. Davies himself was estopped, by the submission which he signed, from contesting the authority of the arbitrators. It would be most pernicious if, as has been contended, arbitrators appointed by the Society, and acting *bonâ fide* under the belief that their predecessors were incapable of acting, were not to be considered as proper arbitrators, and their award were to be held invalid, because such belief arose from a misapprehension.

COLERIDGE, J.:

I am of the same opinion. The question turns upon the construction of stat. 4 & 5 Will. IV. c. 40, s. 7. The justices had no jurisdiction unless there had been either no compliance with the application for settlement by arbitration, or a neglect or refusal on the part of the arbitrators to make an award. In the present case, when the matter came before the justices, it was proved to them that an award had actually been *made; and there was nothing on the face of it to show that it was invalid. It lay, therefore, upon the parties disputing the award to show its invalidity, before any jurisdiction could accrue to the justices. As to the submission, the stipulation made by Davies for his

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striking out one of the names shows that he was fully aware of the nature and purport of the submission which he signed. I cannot see how the magistrates could come to any other conclusion than that Davies was estopped by the submission, unless the transaction was tainted with fraud; and of that neither the affidavits nor the statements before the magistrates furnish any evidence. It would be most mischievous if decisions of this kind, which must necessarily be, now and then, a little irregular, but which are intended to be final, should be disturbed upon such grounds as have been urged in the present case. There has been a substantial compliance with the Act.

WIGHTMAN, J.:

The facts of the case, as they appear on the affidavits, did not warrant Davies in contesting the jurisdiction of the arbitrators; and the attempt to show jurisdiction in the magistrates has failed.

(No fourth Judge was present.)

Rule absolute.

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(3 EL. & BL. 372—377; S. C. 23 L. J. M. C. 121.)

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The ratepayers of a district of a parish adopted so much of the provisions of the Lighting and Watching Act, 1833 (3 & 4 Will. IV. c. 90), as relate to lighting, ordered a certain sum to be raised for the succeeding year, and elected inspectors; and a treasurer was appointed. The inspectors, in the course of the year, called upon the overseers of the parish to collect and levy, and pay to the treasurer, a part of this sum. The overseers not having obeyed, a summons was taken out, reciting an information that they had neglected to pay to the treasurer the amount of the order made on them by the inspectors in pursuance of the statute, and requiring them to appear to answer the information, and be dealt with according to law. They appeared, and made their defence against the complaint, which was supported on behalf of the inspectors; when the justices refused to issue a warrant of distress on the overseers in pursuance of sect. 38, though they were requested, on the part of the inspectors so to do.

A rule was obtained, under the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5, calling on the justices and overseers to show cause why the justices should not issue such warrant. The affidavit on which the rule was granted showed the above facts, but did not show whether any or what evidence was given before the justices at the hearing, or what the defence was.

The overseers having made no affidavit in answer, but opposing the rule on the ground that it did not appear that any facts had been laid before the justices making it incumbent on them to issue their warrant, this Court made the rule absolute, with costs to be paid by the overseers.

CROWDER, in last Term, obtained a rule calling on John Deverell and Robert Miller Mundy, Esquires, two justices of

Hampshire, and Edward H. Haggett, James Court White, and George Small, overseers of the poor of the parish of Warblington, in the said county, to show cause why the two justices should not issue a warrant of distress in pursuance of stat. 3 & 4 Will. IV. c. 90, s. 38, for levying, by distress and sale of the goods of all or any of the said overseers, the sum of 150*l.*, being the amount directed to be paid by the said overseers by an order, dated 6th July, 1853, issued under the hands of five of the inspectors duly elected for carrying the provisions of the said Act into effect in the district of St. James, Emsworth, being a part of the parish of Warblington; or why a *mandamus* should not issue directed to the said two justices, commanding them to issue a warrant of distress for the purpose aforesaid.

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From the affidavits on which the rule was obtained it appeared that, on 4th June, 1841, an Order in Council issued, under stat. 59 Geo. III. c. 134, s. 16, whereby her Majesty assigned a district, part of the parish of Warblington, to a chapel in that parish, the district to be named St. James's District, Emsworth. Proceedings then took place (detailed at length in the affidavits) having the effect, as suggested, of an adoption, for this district, of the provisions of stat. 3 & 4 Will. IV. c. 90, so far as they relate to lighting, by a resolution passed at a meeting held on 8th November, 1852: and it was resolved, at the same meeting, that there should be twelve inspectors, who were accordingly then elected; and that the money to be raised in the succeeding year for the purposes of the Act should be 250*l.*: and the affidavits set forth a notice of the above facts, and stated the circumstances under which it was given. A treasurer was afterwards appointed. At a meeting of inspectors (by adjournment) on 6th July, 1853, five inspectors were present; when it was unanimously resolved that the overseers of the parish of Warblington should be required to pay to the treasurer 150*l.*, part of the amount which the inspectors were authorized to call for in the year. An order was then signed by the five inspectors, requiring the overseers to collect and levy the sum, and pay it to the treasurer within three calendar months: which order was delivered to J. C. White, one of the overseers; and a certificate of the election of the inspectors was served on the overseers. Further formalities (not material to the present report) were set out in the affidavits. The overseers did not pay the sum within the time named in the order: and the inspectors directed the treasurer to enforce payment: and the treasurer **“*did, on the 21st day of

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October last, make complaint to Robert Miller Mundy, Esquire," justice of Hampshire, "who thereupon issued a summons, under his hand and seal, of which a copy" was annexed to the affidavit. The summons recited that information had been laid before the justice, for that the overseers had neglected to pay "the treasurer duly appointed for the district of St. James Emsworth, in the said parish of Warblington, by the inspectors of the said district, pursuant" to stat. 3 & 4 Will. IV. c. 90, "the sum of 150*l.*, the amount of a certain order made on you by the said inspectors in pursuance and for the purpose of carrying the provisions of the said statute into effect in the said district, three calendar months having elapsed since the delivery of the inspectors' order to collect and levy the said sum of 150*l.*" The summons then commanded the overseers to appear on 25th October, "before such justices of the peace for the said county as may then be there, to answer to the said information, and to be further dealt with according to law." The three overseers "were duly served with the said summons, and duly appeared, pursuant thereto, before" Mr. Deverell and Mr. Mundy, "and made their defence to the said complaint and summons, by Edwin Albery, of" &c., "gentleman, as their attorney; and the said complaint and summons were supported, on behalf of the" "treasurer of the said inspectors, by this deponent as his attorney." The further hearing was adjourned to 8th November, "and was then resumed, and concluded before the said two justices;" and "the said justices, at such conclusion of the said hearing, refused to issue their warrant for levying the said 150*l.*, which the said overseers of the parish of Warblington were directed to levy, collect and *pay by the said order, and which remained wholly unpaid as aforesaid; although this deponent, as the attorney or agent for the said inspectors and for" "their said treasurer, requested and demanded of them so to do. And this deponent further saith that the said justices have not granted their said warrant thence hitherto."

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It was further deposed that, by reason of the non-payment, the inspectors had been prevented from carrying out the purposes of the Act.

No affidavit in opposition to the rule was put in.

Atherton and Cowling now showed cause :

Assuming that all the steps essential to the adoption of the provisions of stat. 3 & 4 Will. IV. c. 90, had been taken, in conformity

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with sect. 5 and the following sections, still the Court cannot act on stat. 11 & 12 Vict. c. 44, s. 5, without further information than the affidavits supply as to what passed before the magistrates. All that appears is that the overseers were summoned for not paying, and a warrant of distress asked for; and that the summons was opposed: it may be that the inspectors failed to satisfy the magistrates that the Act had been duly adopted, or the resolutions duly passed, or the request duly made on the overseers. The provision of sect. 5 of stat. 11 & 12 Vict. c. 44, was substituted for *mandamus*: and, in conformity with the rule which prevailed as to *mandamus*, it must clearly appear *that the magistrates had before them materials on which they ought to have acted, and have refused to act. They have heard and decided, and, for anything that is shown, rightly. The order of this Court, by sect. 5, is to issue "upon an affidavit of the facts:" the "facts" must be such as to bring the case within the circumstances under which the rule is to be applied for, namely, "where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices." The duty is not shown, unless it is shown what case was made before the magistrates.

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Crowder, contra, was not called upon.

LORD CAMPBELL, Ch. J. :

It seems as if some of the inhabitants of this district had a horror of sanitary reform. I see not the slightest ground for giving way to the objections urged: the proceedings appear to have been perfectly regular; and we are bound to interfere where justices refuse to issue a warrant which they ought to issue. It is said that we are not told what passed before them: but it is enough for us that we see a case in which the facts authorized the issuing of the warrant, and the justices refused to issue it.

COLERIDGE, J. :

No light is thrown on the subject by *the overseers: they do not tell us what passed. If any substantial question had been raised before the justices, no doubt the overseers would have told us of it. This seems to me exactly the case for which the statute meant to provide, and in which we ought to interfere. The statute protects the justices only, not the parties, if the warrant cannot be supported.

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The overseers have satisfied me that no valid objection was raised before the justices. All they do is to instruct two learned counsel to oppose this rule.

*Rule absolute for the issuing the warrant by the justices :
costs to be paid by the overseers.*

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(3 EL. & BL. 377—390 ; S. C. 23 L. J. Q. B. 199 ; 18 Jur. 771.)

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By the governing charter of a Corporation, the community were annually to elect four wardens from the men of the community.

In fact, for about four hundred years, the election had been made by a court of assistants, who were elected, by the court itself, from the body of the community. The wardens had always been elected from members of the community, and generally, but not uniformly, from those who were members of the court of assistants :

Held : 1. That a bye-law establishing such a mode of election would be good.

2. That the passing of such a bye-law in fact might be presumed from the usage.

CLEASBY, in last Term, obtained (in the Bail Court, before Crompton, J.) a rule calling on Charles Powell, John Horsley Palmer, Thomas Lane and Thomas Barker, Esquires, to show cause why one or more information or informations in the nature of a *quo warranto* should not be exhibited against them, to show by what authority they claim to exercise the office *of wardens of the Company of Mercers of the city of London : upon the grounds :

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1st. That they were illegally chosen or appointed to the said office ;

2nd. That they were not chosen or appointed by the whole body of the commonalty of the said Company :

3rd. That they were chosen or appointed by a limited portion of the Company calling themselves the court of assistants.

The rule was obtained on the affidavit of the proposed relator, Henry Newnham, a freeman and liveryman of the Company. He deposed that he had discovered and believed that the Company of Mercers was incorporated by a certain ancient Royal charter, granted by Richard II., in the 17th year of his reign, and still in force : by which the King granted that the Men of the Mystery of the Mercery of the city of London might have a perpetual

(1) Wightman, J. had left the Court.

community of themselves; and that such community might severally elect and make, from and amongst themselves, four wardens from the Men of the said Community and Mystery, to exercise, regulate and govern the Community and Mystery aforesaid, and all the men, state and affairs of the same for ever. That the said charter was confirmed by charter and letters patent of 3 Hen. VI.: and furthermore, by his letters patent, the said King Henry VI. granted that the wardens and commonalty of the said Mystery, and their successors, should have a common seal for the sealing and use of the business of the commonalty; and that they might be persons able in law to plead and be impleaded. That the said charter and letters were exemplified and confirmed in 4 & 6 Phil. & M., and in 2 Eliz.: and, finally, James I., in the 10th year of his reign, *confirmed the whole of the preceding charters, but without any alteration or extension.

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That, so far as deponent could discover, and verily believed, no charter altering the constitution of the Company was granted to the Company or Mystery, until the charter of 6 Car. II. hereinafter mentioned: * * and that no alteration in the constitution of the Company, as deponent could discover, and as he believed, was lawfully made by charter or otherwise until the charter of 6 Car. II.

That Charles II., by charter of 6 Car. II., the former charters having been surrendered to the Crown after the judgment in *quo warranto* against the city of London, granted to the Company a new charter with a different constitution (some particulars of which were stated); and that, by stat. 2 W. & M. c. 8, it was enacted that all the Companies of the said city should be restored to their former constitutions, as they lawfully stood at the time of the said judgment given; and that as well all surrenders, as charters made or granted by Charles II. or James II. since the giving of the said judgment, should be null and void to all intents and purposes (1).

That deponent believed and submitted that, from the time of the passing of the said Act, the constitution of the said Mystery or Company, as regulated by the said charters of Ric. II. and Hen. VI. became and was the lawful constitution thereof, such Mystery or Company being *one of the Companies of the said city mentioned and referred to in the said Act: and that the freemen and liverymen or commonalty thereof could not, from that time, be lawfully excluded by any court of assistants from the choice and election of the wardens who were to have the government thereof: and that

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the affairs and concerns of the said Company ought to have been thenceforth, and now to be, managed by four wardens to be elected by the general body of the commonalty of freemen, or, as they are sometimes called, the generality of the Company : and that each of the said commonalty is entitled to exercise his elective franchise for the appointment or election of such four wardens.

That certain persons, being members of the said commonalty of the said Company, have, as hereinafter more particularly shown, usurped to themselves the management of the affairs and concerns of the Company, to the exclusion of the others of the commonalty ; and, in particular, have excluded the greater number of the commonalty from their right of interfering or voting in the election of the wardens of the Company.

That deponent had discovered and believed that for many years the affairs and concerns of the said Company have not been governed by wardens duly chosen in accordance with the said charters of Ric. II. and Hen. VI., or either of them, or according to the legal constitution of the Company : but that the said affairs and concerns have, for many years, been governed by certain persons assuming to constitute a court of assistants, consisting of from twenty-eight to thirty-six persons, or thereabouts : one of whom is called and assumes to be the prime warden or master of the Company ; three others of whom are called and assume to be wardens of the Company ; *and the others of whom are called and assume to be members of the court of assistants. That, for many years, the persons so constituting or assuming to be such court of assistants, who all assume to hold their offices as members of the court of assistants for their respective lives, have assumed to themselves, and exercised, the exclusive right to choose or appoint annually from among themselves the prime warden or master and wardens of the Company : and such court of assistants, from time to time, when and as vacancies (or what they are pleased to call vacancies) occur in such court of assistants, fill up such vacancy by electing or calling up at their sole pleasure or discretion such other members of the commonalty of the Company as they deem proper to be members of the said court of assistants ; and the persons being so elected or called up thereupon become (or assume to become) members of such court of assistants for life. That there are, as deponent believed, between 100 and 200 persons who constitute the commonalty of the Company, who have duly acquired their rights, as such, either by birth or servitude ; all of whom are

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entitled to exercise their elective functions in the choice of the wardens for the time being of the Company equally with those who are members of the pretended court of assistants: and that such of the members of the commonalty as are not members of the court of assistants are and have been unduly excluded from exercising their elective privileges as members of the Company.

That the election of prime and other wardens usually took place in September in every year; and that deponent, in June, 1852, gave notice to the attorneys of the Company, requiring that the master and wardens should be elected by the commonalty according to the *constitution of the Company. That, notwithstanding this was well known to the court of assistants, that court had, in September, 1852, chosen the persons named in the rule as prime warden or master and wardens; and such persons had assumed to act as master and wardens, and, together with the persons who assumed to constitute the court of assistants, to manage the affairs of the Company. That the persons assuming to act as master, wardens and members of the court of assistants acted as trustees of large estates real and personal, enjoying considerable patronage and deriving pecuniary advantages. That the members of the court of assistants allowed certain officers to be elected by the commonalty.

In answer, an affidavit was made by the clerk and solicitor of the Company jointly. They deposed that the earliest charter of which the Company possessed any authentic record was the charter of Ric. II., mentioned in Newnham's affidavit; and that the words of the charter, in respect to the part of the grant mentioned in that affidavit, were: "*quòd ipsi de cætero unam communitatem perpetuam de seipsis habeant, et quòd eadem communitas singulis annis eligere possint et facere quatuor custodes de hominibus dictarum communitatis et mysteræ, ad supervidendam, regendam et gubernandam mysteram et communitatem prædictas, ac omnes homines, personas et negotia earundem in perpetuum.*" That several other charters were granted to the Company as stated by Newnham in his affidavit. The affidavit then referred to stat. 1 Edw. IV. c. 1 (A.D. 1461), by which it was enacted (sect. 3) that all liberties, privileges, franchises, &c., corporations, &c., and all manner of grants, &c., which were granted in the times of Henry IV., Henry V. and Henry VI., to (amongst *others) the wardens of the commonalty of the Mystery of Mercers of the city of London should be in like force and-virtue as if they had been granted by any King or Kings lawfully reigning, as if they had been granted in the times of Edward III. and

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Richard II., late lawful Kings of England. That deponents verily believed that many of the books and documents of the Company were destroyed by the great fire in London in 1666; but that the Company have still several ancient books and documents of the Company belonging to them; and from such ancient books it appears, and deponents verily believed, that, prior to the said charter of Ric. II., and as far back as 1847, and from thence continually down to the time of the aforesaid charter of Ric. II., the Company of Mercers of the city of London was governed by wardens, four in number, annually elected; and that each of those four wardens, on leaving office at the end of the year, nominated his successor. (Entries were set out.) That deponents believed that the Company of Mercers was and has been a guild or Corporation by prescription from time immemorial. That it appears from the ancient books of the Company, and deponents verily believed, that, after the charter of Ric. II. was granted in 1394, as aforesaid, the custom and practice of the outgoing wardens to appoint their successors continued unchanged and without interruption, as it had previously existed as before mentioned, until 1463; and that the entire business of the Company was managed by such wardens. That it further appears from the books of the Company, and deponents verily believed, that, from 1463, there has existed a body of the liverymen of the Company called and known as the court of assistants of the *Company; and that the number of such court of assistants, between the years 1527 and 1684, when Charles II. granted the Company their new charter, always exceeded twelve, and varied from nineteen to twenty-four persons, besides the four wardens: and, from that period to the present time, such court of assistants has varied from twenty-one to thirty-two persons, being liverymen of the Company.

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The surrender of the Company to the Crown, dated 3rd October, 1684, antecedent to the grant of the charter of Car. II. before mentioned, was set out.

That deponents verily believed that such court of assistants was originally established on account of the trouble and inconvenience, in early times, of summoning and assembling the whole body of the commonalty of the Company. That, not only have the court of assistants elected the wardens of the Company for many years in modern times, as stated in Newnham's affidavit, but that, during the whole time that such court of assistants has existed as aforesaid, the wardens of the Company have invariably from time to time been elected and chosen, and still are elected and chosen, at such

court of assistants of the Company; as appears by the records and documents of said Company. That, as far as deponents could ascertain from the books of the Company, the practice has been, ever since the existence of the court of assistants and from the year 1463 to the present time, and still is, for the warden and court of assistants to elect persons from the livery of the Company to fill up vacancies in such court of assistants as deaths occur. And that the members of the court of assistants are invariably liverymen of the Company, and members of the commonalty *at large of the Company; and that they continue liverymen of the Company, and members of the body of the commonalty at large, after their election to be members of the court of assistants, and retain all the rights and privileges of liverymen of the Company. That, although deponents had carefully searched and examined the records and documents of the Company from the earliest times of which the Company possess any records or books, they cannot discover that at any time since the first existence of the Company has there been any instance of the election of any warden or wardens by the body of the commonalty at large of the Company. That they believed that the election of the wardens of the Company, from the earliest times, was, and always has been, either by the wardens for the time being of the Company down to 1463, or by the court of assistants of the Company from the year 1463 down to the present time.

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That the persons named in the rule were, in September, 1853, elected wardens by the court of assistants, in accordance with the usual mode of election; and that each was, at the time of his election, a freeman and liveryman of the Company, and a member of the commonalty.

That deponents denied that they had assumed or exercised the exclusive right to choose or appoint annually from amongst themselves the prime warden or master and wardens of the Company; although, of late years, the fact has been that the prime warden or master and wardens have, at the time of their election, been members of the court of assistants. That they had, at the time of their election, invariably been freemen of the Company and members of *the body of the commonalty at large. That there are instances, in the records of the Company, in which they have not been members of the court of assistants at the time of their election, or previously thereto. But that the practice had been to elect men who were members of the court of assistants, as having more knowledge

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and experience of the affairs of the Company than others not upon the court. That the prime warden or master and wardens and court of assistants had always, from the time of their first existence, had almost the entire management of the affairs of the Company.

Sir A. J. E. Cockburn, Attorney-General, *Bramwell* and *Borill* now showed cause :

The affidavits in answer show a good title. A bye-law limiting the number of electors, provided no integral part of the corporation were excluded, would be good: *The Case of Corporations* (1), *Rex v. Ashwell* (2), *Rex v. Westwood* (3).

(LORD CAMPBELL, Ch. J. : Questions of this kind were more frequently before the Courts, some years ago : we then used to think this quite trite law.)

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Next, the existence of such legal bye-law may be presumed from usage ; and the law may be pleaded as not extant in writing: *Rex v. Head* (4), *Rex v. Ashwell* (2). And, further, the words of the charter itself are not express against this mode of election, and may therefore be explained by usage: *Gape v. Hanley* (5), *Rex v. The Mayor and Citizens of Chester* (6). The case of *Rex v. Attwood* (7) is exactly in point. The relator might here, by inquiry, have learned that the usage was as stated in the affidavits in answer ; and the rule should therefore be discharged with costs ; for, if these facts had been before the learned Judge when the rule was applied for, he would have refused the application.

Cleasby, contra :

It is true that a good bye-law may be presumed from usage ; and the usage here is sufficiently shown if the bye-law be good. But the relator contends that such a bye-law as would establish this mode of election would be bad, as constituting a self-electing body and infringing the original constitution of the Company. This question is not decided by *Rex v. Attwood* (7). It is true that the same objection might have been taken there ; but it was not noticed. The objection that the election was from a restricted

(1) 4 Co. Rep. 77 b.

(2) 12 East, 22.

(3) 33 R. R. 24 (7 Bing. 1).

(4) 4 Burr. 2515.

(5) Note to *Blankley v. Winstanley*,
1 R. R. 704 (3 T. R. 288).

(6) 1 M. & S. 101.

(7) 38 R. R. 290 (4 B. & Ad. 481).

number was suggested here by the report of the Municipal Commissioners(1); but that is certainly answered in point of fact, as in *Rex v. Attwood* (2).

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(LORD CAMPBELL, Ch. J.: That objection would have been fatal. But was not the objection on which you now rely one of the grounds in *Rex v. Attwood* (2) ?)

It is there mentioned in the second ground: but it was scarcely noticed in argument: probably the affidavits did not raise the point, as it is not distinctly noticed in the judgment. The body of electors cannot be limited, by bye-law, to a body not representing every integral part of the Corporation.

(LORD CAMPBELL, Ch. J.: All the members of the court of assistants here must have been members of the commonalty.)

That would not make them representatives of the commonalty if they themselves select the members of the commonalty who are to constitute their body. * * It is to be observed that in *Rex v. Attwood* (2) the charter of Ric. II. confirmed the customs of the guild, a circumstance upon which TAUNTON, J. relies: but here the supposed bye-law, or usage, is later than the governing charter, and cannot control its generality.

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LORD CAMPBELL, Ch. J. :

I think that, if the facts now disclosed had been before my brother CROMPTON when the rule was moved for, he would not have granted the rule. There is no ground whatever for questioning the validity of the election. Here is an usage of nearly four hundred years: if that can have a lawful origin, we ought to presume one. Now such an usage would be justified by a bye-law limiting the electors as they are here *limited: such a supposed bye-law has been held good again and again. The case is exactly like *Rex v. Attwood* (2), where this Court refused to interfere. We should not be acting rightly if we disturbed an election so made. As to there being a self-election, these officers are not self-elected. It may be right that the election should be in the general body: but that question is for the Legislature. It is supposed that the Corporation

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(1) Second Report, 1837, London Companies, 1. (2) 38 R. R. 290 (4 B. & Ad. 481).

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of London is to be reformed: the Legislature may then take the point into consideration (1).

COLERIDGE, J.:

We must discharge this rule, upon the invariable principle that, when we find a very ancient usage, we are to presume any thing which will support it. If we were to listen to ingenious legal objections or astute remarks, or enter into minute inquiries into evidence, the general result would be that, the older an usage was, the less should we be able to support it: and, instead of the antiquity being a protection, an old usage would be more difficult to defend than a modern one. Here we have an admitted uninterrupted usage from 1463. It was at first suggested that it could be traced back only to a later era; but from the affidavits in answer we find that it has prevailed so long. We may fairly infer the existence of a bye-law limiting the power of election to this select body: and I do not at all agree that the self-election destroys the representative character.

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WIGHTMAN, J.:

Rex v. Attwood (2) is a direct authority in favour of the defendants. But it is objected that the body to whom the power of election is given is itself self-elected. I think that this body stands on the same footing as the officers elected: I cannot see why the right of delegation may not be delegated in one case as well as in the other. There cannot of course be any bye-law restricting the persons eligible, nor any extension of the eligibility to persons not originally eligible.

ERLE, J.:

I am of the same opinion: and I have no remarks to add.

Rule discharged, with costs.

(1) The Report of the Commissioners appointed to inquire into the existing state of the Corporation of the City of London, &c., has been presented to both Houses of Parliament, and

printed, A.D. 1854. The Commissioners abstain from noticing the Companies, as not being constituent portions of the Corporation: p. x.

(2) 38 R. R. 290 (4 B. & Ad. 481).

REG. v. EYTON.

(3 EL. & BL. 390—396; S. C. 18 JUR. 399; S. C. nom. *In re Surveyors of Tryddyn*,
23 L. J. M. C. 45; 22 L. T. O. S. 281.)

1854.
Jan. 13.
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Sect. 95 of the General Highway Act, 5 & 6 Will. IV. c. 50 (which enacts that, in the case of an indictment for non-repair of a highway preferred at the Assizes or Quarter Sessions by order of justices as there directed, the costs of the prosecution shall be ordered, by the Judge who tries or the justices of such Quarter Sessions, to be paid out of the rate made and levied in pursuance of the Act in the parish in which such highway shall be situate) extends, not only to rates made or levied at the time of the order, but to the highway rate in general; and, if there be not sufficient funds in the hands of the surveyors at that time, they must make a rate for the purpose.

The order binds, not only the surveyors in office at the time, but their successors, until the costs be paid.

Such costs are not, within the meaning of sect. 103, penalties, or forfeitures, inflicted or authorized by the Act to be imposed for any offence against the same, nor balances due from a surveyor, nor costs and charges allowed and ordered by the authority of the Act the manner of levying, recovering and applying of which is not thereby otherwise particularly directed. And therefore they cannot be levied by distress, under the proceedings directed by that section. But a *mandamus* will issue to compel the taking of the proper steps.

At the General Quarter Sessions for Flintshire, holden 1st July, 1852, the Court made an order *reciting an order of Special Sessions, which directed a prosecution of the inhabitants of the township of Tryddyn in the parish of Mold, in that county, for non-repair of a highway in the township, the surveyors of the township having appeared to an information preferred by Charles Harrison, and denied the liability; reciting also that the indictment was preferred by Harrison at Quarter Sessions, and the defendants pleaded Guilty; and it was "therefore ordered by us, the justices by and before whom the said bill of indictment was tried, that the costs of such prosecution incurred by the said Charles Harrison, amounting to the sum of 72*l.* 8*s.* 3*d.*, be paid to the said Charles Harrison by the inhabitants of the said township of Tryddyn, on or before the 31st day of August, A.D. 1852, out of the rate made and levied, or to be made and levied, within the said township of Tryddyn in pursuance of an Act" &c. (5 & 6 Will. IV. c. 50).

On the 26th April, 1853, John Lloyd and Roger Bellis were appointed surveyors of the township. A demand for payment of the 72*l.* 8*s.* 3*d.* was made on them, with which they did not comply. An information was exhibited against them, and was heard before John Wynne Eyton, Edward Pemberton and Charles Clough, Esquires, justices of the county: and, the surveyors

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assigning no reason for disobedience of the order, the justices were requested to grant a warrant of distress against their goods, under stat. 5 & 6 Will. IV. c. 50, s. 108: but the justices declined to do so.

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E. Beavan, in Trinity Term, 1853, obtained a rule calling on Messrs. Eyton, Clough and Pemberton, and Lloyd and Bellis, to show cause why the said three *justices should not issue their warrant (as in the rule stated in the judgment in this case).

In last Term (1), *R. V. Williams* showed cause; and *Pashley* and *E. Beavan* were heard in support of the rule. The judgment sufficiently shows the circumstances of the case, and the points suggested in argument, so far as material to the decision.

Cur. adr. rult.

LORD CAMPBELL, Ch. J., in this Term (January 13th), delivered the judgment of the COURT :

This was a rule calling on the defendants, justices of the county of Flint, to show cause why they should not issue their warrant of distress and sale of the goods of John Lloyd and another, surveyors of the highways in, and inhabitants of, the township of Tryddyn, for recovery of 72*l.* 8*s.* 8*d.*, by an order of Sessions, dated 1st July, 1852, ordered to be paid, out of the highway rate for the township, to Charles Harrison, for the costs of a prosecution against the inhabitants of the township for the non-repair of a highway.

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In this case, by consent, a verdict at Sessions had passed for the Crown; and the costs of the prosecution were directed by the justices to be paid out of the highway rate: this was in pursuance of the power given by sect. 95 of the General Highway Act, 5 & 6 Will. IV. c. 50, the words of which are: "The costs of such prosecution shall be directed by" "the justices at such Quarter Sessions, to be paid out of the rate made and *levied in pursuance of this Act in the parish in which such highway shall be situate."

The words "rate made and levied," &c., do not point merely to any particular assessment already made and levied at the time when the order of Sessions issues, but to the highway rate in general; and it was the duty of the persons who were in office at the time the order was made to pay the costs out of any funds then in their

(1) November 21st, 1853. Before Lord Campbell, Ch. J., Coleridge, Wightman and Erle, JJ.

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hands, or, if they had none, to make and levy a rate for the purpose of putting themselves in funds. If properly applied to, and neglecting to pay costs, which, in the one way or the other they possessed, or might procure for themselves the means of paying, they would be guilty of a breach of duty (1); and what is true of them would apply to their immediate successors. But, unless something more be found in the Act than is contained in this section, the remedy now sought for, to enforce performance or punish neglect of duty, could not be applied: the common law would help the party entitled to costs by a writ of *mandamus* (2); but the proceeding by warrant of distress and sale must be founded on statute.

Accordingly, for the rule, *Mr. Pashley* relied on the 103rd section, the words of which are, "all penalties and forfeitures by this Act inflicted or authorized to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this Act, (the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed,) shall, upon *proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any credible witness or witnesses (which oath such justices are in every case hereby fully authorised to administer), or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and conviction, by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands of two or more justices before whom the party may have been convicted."

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We are of opinion that these words do not apply to the present case, notwithstanding the generality of the expression "all costs and charges to be allowed and ordered by the authority of this Act." The subject-matter of the sections are those penalties and forfeitures, those balances due from a surveyor, and all those costs and charges to be allowed and ordered by authority of the Act, "the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed." These latter words seem scarcely applicable in themselves to the costs now in question; for the statute has pointed out the specific fund from which they are to be paid (3);

(1) On the argument, reference was made to *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 75 R. R. 780 (5 C. B. 440).

Q. B. 887), was mentioned in the argument.

(3) On the argument, *Reg. v. Watford*, 75 R. R. 886 (4 Dowl & L. 593), was mentioned.

(2) *Reg. v. Clark*, 64 R. R. 678 (5

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impliedly it authorizes and commands the surveyor to pay them from that fund; and the application of them, when paid, it was totally unnecessary to specify: the costs of the prosecution of an indictment being given, it must be intended that they were given to the party prosecuting.

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But, waiving that argument, what is to be done in order to proceed under the section? There must be *either “proof and conviction of the offences⁽¹⁾ respectively,” which clearly cannot apply except in cases of offences which cause penalties or forfeitures to be incurred, and, at most, balances to be paid, the non-payment of which is the offence to be proved and convicted of; or there must be an order made, and that order must make it an immediate and direct duty for the party on whom it is made to pay what is ordered to be paid, whether it be penalty, forfeiture, balance or costs; but this cannot apply to the case before us; for, the fund being specified, and that being a rate made or to be made, reasonable time to put himself in funds must necessarily be given to the surveyor. He is guilty of no default until such time has elapsed; if he has to make a rate, that rate may be appealed against to the Quarter Sessions; considerable delay may occur without any fault of his; and, to suppose that upon order made he becomes at once liable to distress and sale of his goods, or imprisonment, is not only unreasonable, but inconsistent with the 95th section, which gives recourse specially to the highway rate, with all the consequences of course implied to which we have just alluded.

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When we proceed with the section, we find that its further provisions are confined to the case of fines, penalties and forfeitures, and the costs made incident to them, and are wholly inapplicable to the present case; and the section concludes with applying the penalties and forfeitures when levied, half to the informer, and half to the surveyor of the parish where such offence, neglect or default shall happen, to be applied towards the repair of the highways thereof, unless the surveyor *shall be himself the informer, in which case the whole shall be applied towards the repair of such highway, meaning probably highways.

Looking then at the whole section, which is very carelessly drawn, it seems to us clear that the object of it is to provide means for the recovery of penalties and forfeitures, and unpaid balances, and the costs and charges incident to the proceedings which may be had for

(1) On the argument, reference was made to *Eggington's* case, 2 El. & Bl. 717, and to stat. 43 Eliz. c. 2, s. 4.

imposing the two former, or for procuring the order for the payment of the latter : all these are summary proceedings ; and it is clear that to summary proceedings only the Legislature was looking when it enacted these provisions (1).

The parties applying for the rule, therefore, have mistaken their course ; and it must be discharged.

Rule discharged.

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ROBSON v. DOYLE.

(3 EL. & BL. 396—399 ; S. C. 18 JUR. 652.)

1854.
Jan. 30.

Where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under the Common Law Procedure Act, 1852, is to apply at the trial for an amendment under sect. 37. The misjoinder is not such a defect or error as can be amended after the trial by the Court in banc under sect. 222.

[Obsolete : see now R. S. C., Order XVI., r. 11.]

KERKIN v. KERKIN.

(3 EL. & BL. 399—401 ; S. C. 18 JUR. 813.)

1854.
Jan. 31.

A summons was taken out in the county court by A. against B., to recover lands under stat. 9 & 10 Vict. c. 95, s. 122 (2).

On application for a prohibition by B., it appeared that B. held, as tenant to C. in his lifetime, two farms, C. being leaseholder of the one, and tenant in fee of the other. C. died ; and A. produced a will by which he was devisee of all C.'s real estate, and appointed executor. A. proved the will, and gave B. notice to quit. B. *bonâ fide* disputed the validity of the will :

Held, that the restriction contained in sect. 58, as to the jurisdiction of the county court when title to corporeal hereditament comes in question, applies to proceedings under sect. 122. That title to the leasehold could not here come in question, inasmuch as the probate was conclusive that the title to that was in A. But that title to the freehold did come in question. And the prohibition went as to the freehold farm, and was refused as to the leasehold (2).

KINGDON, in this Term, obtained a rule *nisi* to rescind an order of MARTIN, B., made in the vacation, for a prohibition in the above plaint.

From the affidavits on both sides it appeared that William Kerkin and Richard Kerkin were brothers. William was the elder son, and in the lifetime of their father had become his tenant from year to year of two farms under the value of 50*l*. The father was owner of

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(1) *Sellwood v. Mount*, 55 R. R. 401 (1 Q. B. 726), was mentioned in the argument

(2) See now 51 & 52 Vict. c. 43 (repealing and superseding the 9 & 10 Vict. c. 95), s. 56.

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the one farm in fee; of the other he was possessed for a term of years. The father died in 1853; and Richard Kerkin produced a will by which the estates were both bequeathed to him, and he was appointed executor. This will was proved, on the 3rd of March 1853, in the Archdeaconry Court of Cornwall. Notice to quit was given by Richard Kerkin to William Kerkin: and, he refusing to go out, a summons was taken out by Richard Kerkin, under stat. 9 & 10 Vict. c. 95, s. 122, in the County Court of Cornwall holden at St. Austell. It appeared by the affidavits that the validity of the will was *bonâ fide* disputed by William; and on that ground MARTIN, B. made the order complained of.

J. D. Coleridge now showed cause:

Stat. 9 & 10 Vict. c. 95, s. 58, provides that the Court shall not have cognizance, *inter alia*, of any action in which the title to any corporeal hereditament shall be in question. Here the very point is, whether William, the heir-at-law, or Richard, the devisee, has title to this land.

(LORD CAMPBELL, Ch. J.: The questioning the validity of the will does bring the title of the freehold in question: but the leasehold is in the executor; and the probate is conclusive as to who is executor. The title therefore to the leasehold land cannot come in question in the county court; and as to that the prohibition cannot go. As to the freehold, as at present advised I think the order right.)

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Kingdon, in support of the rule, was desired by the *Court to confine his arguments to the freehold:

Sect. 58 does not apply to proceedings under sect. 122. Sect. 126 shows that questions of title in such cases are to be tried by the county court Judge, and that there is a method of appealing by an action of trespass.

(LORD CAMPBELL, Ch. J.: I at present think that sect. 58 does restrain the jurisdiction under sect. 122. Questions on the validity of devises are frequently of the utmost nicety. I can hardly believe that the Legislature intended the county court to decide such a question as that raised in *Egerton v. Earl Brownlow* (1).

CROMPTON, J.: The sections following sect. 122 seem to show that the Legislature contemplates that the county court is to decide on questions of title as to whether the landlord has a lawful right to

the possession : that is, such questions as arise from a dispute as to whether the lease was determined, or the like. But it does not contemplate that he is to decide questions as to whether the claimant has title as landlord.

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WIGHTMAN, J., referred to *Jones v. Owen* (1).)

LORD CAMPBELL, Ch. J. :

For the reasons given in the course of the argument, the plaintiff is right as to the leasehold, wrong as to the freehold ; and the rule must be accordingly.

COLERIDGE, WIGHTMAN, and CROMPTON, JJ., concurred.

The following rule was drawn up : " That the order of MARTIN, B. dated " &c., " be rescinded as respects the leasehold premises mentioned in the affidavits in the said rule named ; and that the rule be discharged as respects the freehold premises in the said affidavits also mentioned."

COUCH v. STEEL (2).

(3 EL. & BL. 402—415 ; S. C. 2 C. L. R. 940 ; 23 L. J. Q. B. 121 ; 18 Jur. 515 ; 2 W. R. 170 ; 22 L. T. O. S. 271.)

1853.
Nov. 15, 16.
1854.
Jan. 18.
[402]

1st count. That plaintiff engaged with defendant, to serve on board defendant's (a British) vessel as a common seaman, on a specified voyage from and to a British port. Breach : that the vessel was leaky and unseaworthy, by which plaintiff became unwell and sustained damage :

Held, on demurrer, that the count was bad, there being no allegation of knowledge or deceit, nor of any express warranty that the vessel was seaworthy ; and the law not implying any such warranty from the relation of shipowner and seaman (3).

2nd count. That defendant neglected to supply and keep on board the vessel a proper supply of medicine, whereby plaintiff's health suffered :

Held, on demurrer, that stat. 7 & 8 Vict. c. 112, s. 18 (4), makes it the

(1) 79 R. R. 888 (5 Dowl. & L. 669).

(2) *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. 326, 19 L. T. 30 ; *Jones v. Stanstead, &c. Rail. Co.* (1872) L. R. 4 P. C. 98 ; *Pickering v. James* (1873) L. R. 8 C. P. 489, 42 L. J. C. P. 217 ; *Gorris v. Scott* (1874) L. R. 9 Ex. 125, 43 L. J. Ex. 92, 30 L. T. 432 ; *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex. D. 441, 46 L. J. Ex. 775, 36 L. T. 761 ; *Hildige v. O'Farrell* (1880) 6 L. R. Ir. 493, C. A. ; *Robertson v. Amazon, &c. Co.* (1881) 7 Q. B. D. 598, 51 L. J. Q. B. 68, 46 L. T. 146 ; *Reg. v. Hall* [1891]

1 Q. B. 747, 60 L. J. M. C. 124, 64 L. T. 394 ; *Cowley v. Newmarket Local Board* [1892] A. C. 345, 62 L. J. Q. B. 65, 67 L. T. 486 ; *Thompson v. Brighton (Mayor)* [1894] 1 Q. B. 332, 63 L. J. Q. B. 181, 70 L. T. 206, C. A. ; *Saunders v. Holborn Board of Works* [1895] 1 Q. B. 64, 64 L. J. Q. B. 101, 71 L. T. 519.

(3) See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 458.

(4) Repealed : 17 & 18 Vict. c. 120, s. 4. See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 200.

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duty of the shipowner to have on board such medicines; and that, though the Act imposes a penalty, recoverable by a common informer, as the specific punishment for the breach of that duty as to the public, sailors sustaining a private injury from the breach of that statutable duty are entitled to maintain an action to recover damages. And that the count was good.

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THE first count of the declaration alleged that defendant, then and still being a subject of her Majesty Queen Victoria, was the owner of a certain British registered barque or vessel, called and known as the *Persian*, which, at the time of the making of the agreement, was in port within this realm, to wit in the port of Plymouth: and plaintiff, then being a subject of her said Majesty, was then an able bodied seaman in good health, duly registered, and had a register ticket. "And thereupon plaintiff in his own behalf, and defendant by one John Davis, the master of the said barque or vessel of defendant, and the agent of defendant in that behalf, made and entered into an agreement in writing, in the form and containing all the matters and things, and made, entered into, signed, dated and attested, in all things, as required in and by the statute in that case" &c.: Whereby it was agreed, by and between plaintiff and defendant (amongst other things), that defendant engaged plaintiff to serve, and plaintiff promised to serve, as a seaman in and on board the said barque or vessel from a certain place, to wit Plymouth, to a certain other place, to wit Aden, and from the last mentioned place to a certain other place, to wit Calcutta, *and from the last mentioned place to a certain other place, to wit England, for wages and reward to be paid by defendant to plaintiff in that behalf. That plaintiff shipped himself on board, and served on the voyage out, and performed the said agreement in all things on his part. "Yet the defendant so carelessly and negligently managed, fitted out and equipped the said barque or vessel that, by reason thereof, and of the defendant's neglect and default in respect of the said barque or vessel, the barque or vessel, at the time of her sailing from Plymouth aforesaid and commencing the said voyage, was wholly unseaworthy and in a leaky and dangerous condition, and unfit to be sent or to go to sea; and, by reason thereof, the plaintiff was, during the voyage aforesaid from Plymouth aforesaid to Aden aforesaid, and from Aden aforesaid to Calcutta aforesaid, unable to sleep in his hammock, and was continually wet; and thereby, and by reason of the excessive and unreasonable labour which the plaintiff was then, during all the voyage aforesaid, compelled, in

consequence of the unseaworthy, leaky and dangerous condition of the said barque or vessel, to undergo, the plaintiff, during the said voyage," became sick &c.

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Second count. That, whilst defendant was such owner of the said barque or vessel as aforesaid, and before and at the commencement and during all the continuance of the said voyage, and after the making of the said agreement, and whilst plaintiff served on board of the said barque or vessel as such seaman, and under the said agreement, the defendant neglected to provide or keep, and made default in providing and keeping, on board the said barque or vessel a sufficient and proper supply of medicines and medicaments suitable to accidents and *diseases arising on sea voyage: whereby, and by reason of such last mentioned neglect, plaintiff was unable to be cured of his said sickness on board of the said barque or vessel, and suffered great pain &c.

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Demurrer to both counts. Joinder.

The case was argued in last Michaelmas Term (1).

T. K. Kingdon, for the defendant :

As to the first count. No duty, such as that which seems to be insisted upon, results from the agreement set out in the declaration. It is not alleged that the defendant knew of the unseaworthiness; and the plaintiff took upon himself the risk as to the state of the vessel. Indeed it does not appear but that the plaintiff knew of the state of the vessel, and made his contract for wages accordingly. The case is like *Seymour v. Maddox* (2), where a duty on the part of the owner of a theatre, to provide for the floor of theatre being secure, was alleged as resulting from his having engaged the party to perform at the theatre: but the Court refused to treat the allegation of duty as a substantive averment of fact, and, being of opinion that no such duty resulted from the relation of the parties, held that no action lay for damages resulting from the insecure state of the floor. So in *Priestley v. Fowler* (3) it was alleged that, defendant having directed plaintiff, as his servant, to carry goods in a certain van, it became defendant's duty to take care that the van was in a proper state of repair; and the plaintiff complained of injury resulting to him from the improper state of the cart: but it was held that the action did not lie, *no such duty resulting from the relation of the parties. Here there is not even

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(1) November 15 and 16, 1853, before
Lord Campbell, Ch. J., Coleridge and
Wightman, JJ.

(2) 83 R. R. 484 (16 Q. B. 326).

(3) 49 R. R. 495 (3 M. & W. 1).

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an express allegation of the duty. The case of *Hutchinson v. York, Newcastle and Berwick Railway Company* (1) is also in favour of defendant.

The second count is founded on stat. 7 & 8 Vict. c. 112, s. 18, which enacts: "that every ship navigating between the United Kingdom and any place out of the same shall have and keep constantly on board a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages," according to the scale issued by the Admiralty. But that section imposes a penalty for default; and sect. 62 prescribes the mode of recovering the penalties. This is, therefore, a new right created by statute, with a specific remedy: and no action at the suit of an individual can be brought in respect of such a right.

(The COURT then called on the other side.)

C. Milward, contrà :

As to the first count. The language of PARKE and MARTIN, BARONS, in the House of Lords, in *Gibson v. Small* (2), is in favour of the existence of a legal duty of the owner towards the mariners to provide that the ship be fitted for the voyage at its commencement.

(LORD CAMPBELL, Ch. J.: Do they put it on the footing of warranty?)

[*406] The action here may be considered to be in tort, as in *Lery v. Langridge* (3). *The American law seems to take the duty for granted: Maude and Pollock's Compendium of the Law of Merchant Shipping, p. 87, note (i). The case cannot be determined from the analogy of the law of master and servant, or employer and employee, generally; and therefore such cases as *Seymour v. Maddox* (4), *Priestley v. Fowler* (5) and *Wigmore v. Jay* (6) are inapplicable. The servant, and the party employed, may generally examine that on which they are to be employed: a seaman can hardly be presumed to have similar opportunities of examining the ship.

(COLERIDGE, J.: Is there anything in Lord Tenterden's work warranting the doctrine?)

(1) 82 R. R. 697 (5 Ex. 343).

(2) 94 R. R. 138, 155 (4 H. L. C. 353, 370, 404: affirming the judgment of Ex. Ch. in *Small v. Gibson*, 16 Q. B. 141, which reversed the judgment of Q. B. in *Small v. Gibson*, 16 Q. B. 128.

(3) 46 R. R. 695, 4 M. & W. 337, in

Ex. Ch. affirming the judgment of Ex. in *Langridge v. Lery*, 46 R. R. 689 (2 M. & W. 519).

(4) 83 R. R. 484 (16 Q. B. 326).

(5) 49 R. R. 495 (3 M. & W. 1).

(6) 82 R. R. 706 (5 Ex. 354).

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He points out generally the seaman's right to be protected by the owner (1); and the right is indeed to be implied from the statutes passed for the purpose of enforcing the details of the owner's duty.

As to the second count. Sect. 18 of stat. 7 & 8 Vict. c. 112, gives only a cumulative remedy: the common law engrafts the right of action upon the statutory provision, which is further regulated by stat. 13 & 14 Vict. c. 93, s. 66, &c.

T. K. Kingdon, in reply, was desired by the Court to confine his argument to the second count:

The duty is not one at common law, but created by statutes which attach a penalty to the infringement of the duty.

(COLERIDGE, J.: But is that penalty any satisfaction to the party grieved?)

It may be: the Court which awards the penalty may, by sect. 62 of stat. 7 & 8 Vict. c. 112, in its discretion direct that half the penalty be paid to *the informer, which discretion was probably intended to be exercised where the informer was the party grieved.

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(COLERIDGE, J.: Even then there can be but one informer, whilst the whole crew may be aggrieved.)

LORD CAMPBELL, Ch. J.:

The Court will take time to consider what judgment is to be given on the second count: but we will dispose of the first count now.

The first count discloses nothing more than that the plaintiff had embarked as a seaman on the defendant's vessel; that the vessel was not seaworthy but leaky; in consequence of which the plaintiff became wet and ill. It seems to me that this discloses no contract or legal duty of which there has been a breach, the subject of an action. For aught that appears on this count, the defendant may have been perfectly ignorant of the defects in the vessel, whilst the plaintiff may have examined the vessel before he engaged himself, and have known her state well. Or it may be that both parties were aware of it, and that it was their intention that the seaman should work and fare the harder, and have that considered in his wages. There being no allegation of a *scienter*, if we held the defendant

(1) Abbott on Shipping, p. 174 (8th ed. by Shée).

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liable on this count, we must hold a shipowner always liable to an action from every seaman, if, from any accident, a butt having started or the like, the ship was not seaworthy. No such action has ever been brought: this is a case of the first impression, in support of which neither a decision nor even a *dictum* has been brought to our notice; nor has any legal principle been urged in its support. *Mr. Milward* has referred to some expressions used by *PARKE, B.* in *Gibson v. Small* (1); but they do not at all *warrant the position that there is an implied contract with every seaman that the vessel is seaworthy, and that if it is not an action will lie. Then, on the other hand, *Priestley v. Fowler* (2) seems to me in principle to be the same case as this, and to establish that there is no such contract.

COLERIDGE, J.:

I am of the same opinion. It is not necessary to say how the case would be if there were fraud or concealment. For on this record there is merely a contract to sail on a specific voyage; and there is no allegation of any fraud or moral wrong. The state of the ship may have been such that the defendants and the master may with perfect *bona fides* have believed her to be seaworthy though she was not. The plaintiff therefore must rely on a general principle, that in all such cases there is an implied contract that the vessel is seaworthy. I think it is enough to say that we are now giving judgment in the year 1853, and that no such action as this has ever been maintained, though, if there were such a contract implied, there must have been numerous instances in which the facts would have supported such an action. The only authority relied on were the *dicta* in *Gibson v. Small* (3): but these were used with reference to the law of marine insurance; and that is a branch of the law having no analogy to that of the law of contract between shipowner and sailor. There are many doctrines which prevail in that contract, *uberrimæ fidei*, between insurer and assured, which have no place in any other branch of the law. This is in truth a contract between master and servant, *and is to be decided on the principles applicable to that relation.

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WIGHTMAN, J.:

There is no allegation that the defendant knew of the state of the vessel; and the count is founded entirely on an implied

(1) 94 R. R. 155 (4 H. L. C. 404).

(3) 94 R. R. 155 (4 H. L. C. 370, 404)

(2) 49 R. R. 495 (3 M. & W. 1).

warranty that the vessel was seaworthy. There is no authority that such a warranty is implied. The action is of the first impression, founded only on some *dicta* in *Gibson v. Small* (1). It is enough that these are but *obiter dicta*, and certainly not an authority for supporting the action, when we consider the innumerable instances in which the cause of action, if it was one, must have occurred. If any cases are in point, they are *Seymour v. Maddox* (2) and *Priestley v. Fowler* (3); for this is a case, in substance, of master and servant.

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As to the second count,

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (January 18th), delivered the judgment of the Court :

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The declaration in this case contained two counts, to each of which the defendant demurred. In the first count the plaintiff alleged that the defendant was owner of a vessel called the *Persian*; and that the plaintiff agreed with the defendant to serve, and that he did serve, as a seaman on board the vessel, on a voyage from England to Aden and Calcutta; and that the defendant so negligently fitted out and equipped the vessel, that, by reason of such neglect, she was unseaworthy, *whereby the plaintiff became sick and injured in his health. In the second count the plaintiff alleged that, before and at the commencement and during the continuance of the voyage, the defendant, being the owner of the ship, neglected to provide a proper and sufficient supply of medicines suitable to diseases arising in sea voyages, and that by reason of such neglect the plaintiff was unable to be cured of his said sickness, and suffered great pain. At the close of the argument we expressed our opinion with respect to the first count to be in favour of the defendant; but we reserved our judgment as to the second, as we wished to look more particularly at the Acts of Parliament and such authorities as might be found to bear upon the question raised by that count.

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There is no allegation, in terms, in the second count of any duty on the part of the defendant to supply medicines for the use of the ship's company; but the plaintiff relied upon the obligation cast upon the defendant by the 18th section of stat. 7 & 8 Vict. c. 112, by which it is enacted "that every ship navigating between the

(1) 94 R. R. 155 (4 H. L. C. 370, 404). (3) 49 R. R. 495 (3 M. & W. 1).

(2) 83 R. R. 484 (16 Q. B. 326).

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United Kingdom and any place out of the same shall have and keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, in accordance with the scale" which shall be issued by the Admiralty and published in the *London Gazette*; "and in case any default shall be made in providing and keeping such medicines," "the owner of the ship shall incur a penalty of 20*l.* for each and every default:" and, by sect. 62, it is enacted that the penalty may be recovered "at the suit of any person," and, when recovered, shall be applied in part to the informer, and the residue to the Seaman's Hospital Society. By stat. 18 & 14 Vict. c. 93, s. 64, the duty of issuing a scale of *medicines is transferred from the Admiralty to the Board of Trade; and, by sect. 66, the Board of Trade and local marine boards may appoint proper medical inspectors to inspect the medicines required to be on board. Were it not for the penalty to which the owner of a ship is subjected for not providing and keeping on board a supply of medicines, it seems clear that the action would be maintainable. The enactment provides a benefit for the seamen; and, according to the plaintiff's allegations in the second count, the defendant has violated this enactment; and thereby the plaintiff, being a seaman on board, was deprived of that benefit, and his health was injured. The general rule is that "where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages:" Com. Dig. Action upon the Case (A). The statute of Westm. 2 (1 stat. 13 Edw. I.), c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2nd Inst. 486. And in Com. Dig., Action upon Statute (F), it is laid down that, "in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law." Therefore the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action, in the same manner as if the obligation had been imposed by the common law, or had been expressly included in the ship's articles. However, sect. 18 of stat. 7 & 8 Vict. c. 112, which creates the duty, also makes the party who ought to perform it liable to a penalty for non-performance, to be recovered at the suit *of any person, and to be applied, in part to the informer and the residue to the Seaman's Hospital Society. The penalty being annexed

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to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the public wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable: and the question is, whether the penalty annexed to the offence concludes the plaintiff who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong; but, by the penalty given in the Act now in question (stat. 7 & 8 Vict. c. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common law *right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty. In a case cited in 1 Rol. Ab. 106, *Action sur Case (M)* pl. 16, it appears to have been held that a person having without the King's licence imported cards into England, contrary to stat. 3 Edw. IV. (1), he was not liable to an action at the suit of one to whom the King had granted a licence to import cards, paying rent to the King, and who alleged that he was thereby disabled from paying his rent; as the statute provides that the cards unlawfully imported were forfeited, and the remedy given by the statute ought to be pursued. There, however, the prohibition does not seem to have been intended for the benefit of the person to whom the licence was granted, and the

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(1) C. 4.

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damage which he sustained may have been considered as too remote. The case of *Stevens v. Jeacocke* (1) is clearly distinguishable from the present: no duty was, by the statute in that case, imposed upon the defendant: he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the Act, but to forbear to do that which but for the Act he might have done. The cases cited as authorities for that decision are not applicable to the present case. In *Underhill v. Ellicombe* (2) it was held that, where highway rates were *payable by the provisions of a statute which prescribed a particular mode for their recovery, that mode only could be pursued. And in *Doe d. The Bishop of Rochester v. Bridges* (3) it was held that, a statute having prescribed a particular mode for the recovery of an equivalent for land tax redeemed, no other mode could be adopted for enforcing the payment of the equivalent. In the present case, if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted; but stat. 7 & 8 Vict. c. 112, has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the Act; nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damage arising from the breach of a public duty; the penalty given by the statute being applicable only to the public wrong, and not the private damage. In the case of *Rowning v. Goodchild* (4) an action upon the case was held to be maintainable against a deputy postmaster for a breach of duty in not delivering a post letter as required by stat. 9 Ann. c. 10, though he was, by the same statute, liable to a penalty for detaining letters (5). The objection was taken, but overruled, the Court being of opinion that, though the duty was created by statute, the action lay at common law. In that case, as in this, the penalty was recoverable by a common informer, and not by the party grieved.

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Upon principle then, as well as upon authority, as far as we have been able to find any upon the point, we think the second count is maintainable, and that the plaintiff's right, by the common law, to

(1) 75 R. R. 614 (11 Q. B. 731).

(2) M'Clel. & Y. 450.

(3) 35 R. R. 483 (1 B. & Ad. 847).

(4) 2 W. Bl. 906.

(5) See sect. 40.

maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it, though no actual damage be sustained by any one. The multiplication of vexatious actions, which was to be apprehended if we had not held that the first count of the declaration was insufficient, cannot arise from our supporting the second; for the plaintiff cannot recover upon it without proving that the medicines required by the Board of Trade were not supplied, and that thereby his health suffered; and upon such proof it is fit that he should have a compensation in damages.

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Judgment for the defendant on the first count, and for the plaintiff on the second.

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(3 El. & Bl. 416—429; S. C. 2 C. L. R. 755; 23 L. J. M. C. 65; 18 Jur. 597; S. C. nom. *R. v. Russell Institution*, 2 W. R. 169; 22 L. T. O. S. 237.)

The Russell Institution was founded, according to the prospectus, for the formation of a library of works in ancient and modern literature, the establishment of a reading room provided with foreign and English journals, and other periodical publications, and for lectures on literary and scientific subjects. The funds were raised by shares which were transferable and made the shareholders proprietors, by annual subscriptions from the proprietors, and by other annual subscriptions which entitled the subscribers to the privileges of proprietors. The library consisted of about 18,000 volumes: reviews and other periodicals, books of reference, directories, mining and railway journals, railway time-tables and newspapers, were taken in. The privilege of using all these was confined to the proprietors and subscribers. Lectures were delivered on subjects connected with science, literature and the arts, to which the public were admitted on payment, but which the proprietors and subscribers might attend without payment. The Society possessed buildings comprising a library, a theatre or lecture room, and a news room, all applied to the purposes of the Institution, some money in the funds and some other buildings which were let off, and for which they received rent. All the income was applied to defraying the expenses of the Institution. No dividend, gift, division or bonus, in money or otherwise, could, by the rules of the Society, be made unto or between any of the members. The barrister, under the Scientific

(1) *In re New University Club Duty* App. Cas. 334, 60 L. J. Q. B. 281, 63 (1887) 18 Q. B. D. 720, 56 L. J. Q. B. L. T. 36; *Overseers of Savoy v. Art Union of London* [1896] A. C. 296, 462, 56 L. T. 909; *Inland Revenue Commissioners v. Forrest* (1890) 15 65 L. J. M. C. 161, 74 L. T. 497.

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Societies Act, 1843 (6 & 7 Vict. c. 36), s. 2, certified that the Society was entitled to the benefit of that Act (1):
Held, that it was not so entitled, as not being, within the meaning of sect. 1, a "society instituted for purposes of science, literature, or the fine arts exclusively."

THE Governors of the Russell Institution having been rated, as after stated, appealed: and, notice of appeal having been served, a case was stated, by consent of parties and the order of ERLE, J., under stat. 12 & 13 Vict. c. 45, s. 11. The case, so far as material to the points discussed, was as follows.

[*417] The rate appealed against is a rate for the relief of the poor of the parishes of Saint Giles in the Fields and Saint George, Bloomsbury, in Middlesex, jointly made by the vestrymen of the joint vestry of the said parishes, by virtue of an Act passed &c. (11 Geo. IV. & 1 Will. IV. c. x., local and personal, public, "For the better regulation of the affairs of the joint parishes of Saint Giles in the Fields and Saint George, Bloomsbury, in the county of *Middlesex, and of the separate parishes of Saint Giles in the Fields and Saint George Bloomsbury in the same county"): whereby the vestrymen of the said joint vestry are empowered to make rates for defraying the expenses of relieving, maintaining, employing and managing the poor of the said parishes jointly, and all other expenses connected therewith relating thereto, upon the several tenants or occupiers of all lands, houses, buildings, tenements and hereditaments within the said parishes, or either of them; to be allowed and confirmed by two or more justices of Middlesex.

The rate in question was made on 28th October, 1852, and was, on the same day, duly allowed and confirmed.

In and by this rate the Governors of the Russell Institution are assessed as below.

Tenant or occupier.	Number.	Rateable value.	Amount of rate at 13 <i>l</i> . in the pound.
Governors of the Russell Institution.	Fifty-five.	£166.	£8 19 <i>s</i> . 10 <i>d</i> .

The property in respect of which they are so assessed is called the Russell Institution, and is situate in Great Coram Street in the said parish of Saint George, Bloomsbury, and comprises a library, a theatre or lecture room, and a news room occupied by them for the purpose of such Institution, and a residence for the

(1) See *Reg. v. Phillips* (1848) 70 R. R. 617 (8 Q. B. 745).

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librarian, having a separate entrance, but under the same roof, and communicating internally with the other parts of the building. The building also comprises some baths and wine cellars: but these are distinct from the Institution, and are let off, the rents forming part of the income of *the Institution; and the tenants are separately assessed in the said rate. The premises are held for the residue of a long term of years, at a small ground rent.

The notice of the grounds of appeal stated in substance that, by virtue of stat. 6 & 7 Vict. c. 36 (the Literary Society Exemption Act), the appellants are not liable to be assessed to the said rate in respect of the part of the building so occupied by them; the barrister referred to in the said Act having certified that this Society is entitled to the benefit of the said Act: and that the said rate ought to be altered or amended by assessing the appellants at the sum of 25*l.* only, as heretofore, for the part of the said building which is occupied by the librarian as his residence.

This Society was instituted in 1808: and its objects are stated in the original prospectus, from which the following are extracts.

“The objects of the Institution are the gradual formation of a library consisting of the most useful works in ancient and modern literature, including in the latter foreign as well as English.”

“The establishment of a reading room provided with the best foreign and English journals, and other periodical publications deserving of attention and encouragement.”

“And an Institution for lectures on literary and scientific subjects.”

“The utility of lectures is sufficiently obvious. The design of those to be delivered at this Institution will be, to afford useful instruction rather than popular entertainment. All that is proposed to be done at the onset is, to provide an apartment suitable for the *purpose. It will be matter for subsequent consideration, whether the success of the establishment will justify the assignment of regular stipends to the lecturers, and whether such a measure will be necessary: but it is proposed that persons desirous of taking advantage of the lectures, and not being proprietors, shall pay for each course a distinct subscription, the amount of which may be regulated by the committee in conjunction with the lecturer.”

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The building was not erected by the Society, but was purchased by them of the builder: and the cost thereof with the fittings was 9,000*l.*, or thereabouts; which, with the funds for supporting the Institution, was raised by shares of twenty-five guineas each, and is now the property of the present holders of such shares. Some

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shares have become forfeited, and from time to time have been resold for the benefit of the Institution. The shares are transferable: and the present price is much below the original subscription. Persons who are not shareholders may and do become annual subscribers, and, by reason of their subscriptions, are personally entitled to the privileges of proprietors. The members of the Institution and the annual subscribers at the present time amount to about four hundred; and the privilege of resorting to and using the establishment is confined to them, excepting as to the admission to lectures as hereinafter mentioned.

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The library contains about 18,000 volumes of works in every department of literature and science, for the use of the proprietors and subscribers. The principal reviews, magazines and other periodicals are taken in, together with books of reference, directories, the mining and railway journals, and railway time tables. The news *room is supplied with twenty-four daily and some of the weekly newspapers: some are filed; the others are sold at a reduced price for the benefit of the Institution. Lectures are delivered during the season on various subjects connected with science, literature and the arts: and the public are invited to attend them by advertisement in the newspapers. Some of the lecturers lecture gratuitously; and others are paid out of the funds of the Institution. Proprietors and annual subscribers are admitted to all the lectures. Persons who are neither proprietors nor annual subscribers may be admitted to any of the lectures on paying for their admission. In 1851 and 1852 several soirées, or evening meetings, were held. At these meetings paintings, pieces of sculpture, new inventions in the useful arts, and interesting objects in natural history, were exhibited, and tea and coffee were provided. Tickets entitling persons to admission on those occasions were issued to proprietors only, who were responsible for the price of such tickets. Proprietors were themselves admitted free; other persons, by means of the tickets so sold. The produce of such sale, after defraying the expenses of the soirées, was applied in aid of the funds of the Institution. Many literary and scientific persons attended by invitation.

Besides the building, the Institution is possessed of 4,000*l.* in the public funds, purchased with part of the moneys originally subscribed, the dividends on which form part of the income. The Society is supported in part by the rents of the baths and wine cellars, and by the dividends of stock, and in part by the annual

contributions of the proprietors and subscribers as after mentioned. The rules provide *that each proprietor shall pay an annual subscription of one guinea. Persons not being proprietors, who are admitted as annual subscribers, pay two guineas each per annum: or, if resident members of a proprietor's family, one guinea and a half. The whole income is applied in defraying the expense of repairs of the building and the other expenses of the Institution. And, by the present rules, no dividend, gift, division or bonus, in money or otherwise, can be made unto or between any of the members. This rule was substituted in 1847 for one by which a dividend was divisible amongst the proprietors in certain events.

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Till after the passing of stat. 6 & 7 Vict. c. 36, the whole of the premises were rated under one assessment. In 1847 the Society submitted its rules to the barrister, pursuant to the said Act. By his certificate, dated 28th June, 1847, he certified that this Society was entitled to the benefit of that Act. The Society accordingly claimed to be exempted pursuant to the said Act. In December, 1847, a ratepayer, on behalf of the parish, appealed to the Quarter Sessions against the said certificate of the barrister: and, upon the hearing of the appeal, the said certificate was quashed, and the Society was rated without allowing any exemption, down to 1849. In 1849 the Society again submitted its rules, with some alterations, to the barrister, who gave his certificate, dated the 2nd August, 1849, that this Society is entitled to the benefit of the said Act. Thereupon, in 1849, the Society appealed to the vestry against the then rate, claiming exemption pursuant to the said Act. This appeal was allowed by the vestry; and the vestry then rated the governors at 25*l.* for the part occupied as a residence by the librarian only. The Society continued *to have the benefit of the said exemption down to 28th October, 1852, the date of the rate now appealed against.

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The appellants and respondents mutually agree that the only issue intended to be raised is: Whether the Russell Institution is a society within the meaning of stat. 6 & 7 Vict. c. 36, and, as such, entitled to the exemption claimed.

The existing rules of the Society have been duly certified and filed with the clerk of the peace. Copies of the rules accompanied the case, and were to be taken as part thereof; but no further notice was taken of them in the discussion.

“ If the Court shall be of opinion that the appellants are liable to be rated in respect of the whole of the property, then the rate is to be confirmed. But, if the Court shall be of the contrary opinion,

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then the rate is to be amended by striking out the sum inserted as rateable value in the assessment, and by inserting in lieu thereof the sum of 25*l.* rateable value, and by altering the sum inserted as amount of rate from 8*l.* 19*s.* 10*d.* to 1*l.* 7*s.* 1*d.*, or in such other way as the Court shall direct. A judgment in conformity with the decision of this Court, and for such costs as the Court shall adjudge, to be entered by either party at the Quarter Sessions for Middlesex next or next but one after the decision shall have been given."

The case was argued in last Michaelmas Term (1).

Bodkin, for the respondents :

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This Institution is not a "society instituted for purposes of science, literature, or the fine arts exclusively," so as to be within the *exemption of stat. 6 & 7 Vict. c. 36, s. 1. It was founded and is maintained, not for the promotion of knowledge on public grounds, but with a view to the enjoyment of exclusive privileges by the proprietors : indeed originally a dividend was contemplated ; though, since 1847, that has been excluded from the plan. The case cannot be distinguished from *Reg. v. Gaskell* (2), where an institution, by which books on scientific and general subjects, journals, and newspapers, were provided for the use of the subscribers, was held not entitled to the exemption of the Act. On the other side, reliance may be placed on *Reg. v. Overseers of Manchester* (3). There, however, the exemption was allowed because the object of the institution appeared to be the diffusion of literature, science and an acquaintance with the fine arts among the public in general : the only privilege confined to the members was that of paying money. But, in *Rex v. Brandt* (4), a society formed professedly for the promotion of the science of music, and producing in fact that result, but appearing to have primarily in view the gratification of the musical taste of the subscribers, was held not to be entitled to exemption. If the Society here were open to any person who chose to become a proprietor, the case might be governed by *Churchwardens of Birmingham v. Shaw* (5), where the exemption was allowed. The supply of newspapers shows that the accommodation of the subscribers is the primary object : that circumstance is relied upon in the judgments in *Reg. v. Gaskell* (2). It is in fact a club.

(LORD CAMPBELL, Ch. J. : The public are admitted.)

(1) November 12, 1853. Before Lord Campbell, Ch. J., and Erle, J.

(2) 83 R. R. 545 (16 Q. B. 472).

(3) 83 R. R. 529 (16 Q. B. 449).

(4) 83 R. R. 538 (16 Q. B. 462).

(5) 74 R. R. 523 (10 Q. B. 868).

They are admitted to the lectures only, not to the library *or news room : and only the proprietors and subscribers attend the lectures without payment.

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(ERLE, J.: Is there any instance of rating a subscription library ?)

The question would have arisen in *The Earl of Clarendon v. The Rector, &c. of St. James's* (1) : but the case was decided on another ground.

Pashley, contra :

The exemption was allowed in the case of a subscription library in *Churchwardens of Birmingham v. Shaw* (2). And it is quite clear that the Court of Common Pleas, in *The Earl of Clarendon v. The Rector, &c. of St. James's* (1), would have allowed the exemption, but for the objection that the premises were sublet. It was there argued that *Churchwardens of Birmingham v. Shaw* (2) and *Reg. v. Overseers of Manchester* (3) were overruled by *Reg. v. Brandt* (4) : but the Court considered those two authorities as binding : and indeed *Reg. v. Brandt* (4) was decided on the same day as *Reg. v. Overseers of Manchester* (3) ; so that it is impossible that this Court could have meant to overrule one of these cases by the other. The principle upon which *Reg. v. Gaskell* (5) was decided is not adverse to the appellants. In that case there was a library only, no lectures. The admission of newspapers cannot destroy the privilege : in many societies devoted to the most profound science, as for instance the Cambridge Philosophical Society, newspapers are admitted.

(LORD CAMPBELL, Ch. J.: What if newspapers only were admitted ?)

That is scarcely a safe mode of trying this question : pens, paper and ink together afford the means *of writing, though no two of these do so without the third. It cannot be said that newspapers are entirely unconnected with literature : elaborate essays and criticisms continually appear in them.

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(LORD CAMPBELL, Ch. J.: By sect. 1 of stat. 6 & 7 Vict. c. 36, the Society must " be supported wholly or in part by annual

(1) 84 R. R. 782 (10 C. B. 806).

(4) 83 R. R. 538 (16 Q. B. 462).

(2) 74 R. R. 523 (10 Q. B. 868).

(5) 83 R. R. 545 (16 Q. B. 472).

(3) 83 R. R. 529 (16 Q. B. 449).

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voluntary contributions." Is that so here, where the contributor gets his pennyworth?)

It has been repeatedly so held. *Reg. v. Overseers of Manchester* (1) has not been distinguished from this case. In *Reg. v. Brandt* (2) there was really no more than a club for providing the subscribers with music. In *Reg. v. Cockburn* (3) the principal object of the institution was the promotion of skill in the art of war, which clearly was not within the intention of the statute. No inference can be drawn from that case; nor from *Reg. v. Jones* (4), where the object was the diffusion of religion; nor from *Reg. v. Pocock* (5), where the object was the education of the labouring and manufacturing classes.

Bodkin, in reply. * * *

Cur. adv. vult.

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LORD CAMPBELL, Ch. J., in this Term (January 18th), delivered the judgment of the Court:

In this case the question submitted to us is, Whether the Russell Institution is a society within the meaning of stat. 6 & 7 Vict. c. 36, so as to be entitled to exemption from parochial rates?

The property in respect of which the appellants are assessed to the relief of the poor is situate in the parish of St. George's, Bloomsbury, and comprises a library, a theatre or lecture room, and a news room, occupied by them for the purposes of the Institution. This Society was founded in the year 1808, for the following objects, as stated in the original prospectus: 1. The formation of a library consisting of the most useful works in ancient and modern literature; 2. The establishment of a reading room provided with the best foreign and English journals and other periodical publications; 3. For lectures on literary and scientific subjects.

The funds for purchasing the building and supporting the Institution were raised by shares of twenty-five guineas each. The shares are transferable. Persons who are not shareholders may, and do, become annual subscribers, and by reason of their subscriptions are personally entitled to the privileges of proprietors. The members of the Institution and the annual subscribers at the

(1) 83 R. R. 529 (16 Q. B. 449).

(4) 70 R. R. 600 (8 Q. B. 719).

(2) 83 R. R. 538 (16 Q. B. 462).

(5) 70 R. R. 606 (8 Q. B. 729).

(3) 83 R. R. 550 (16 Q. B. 480).

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present time amount to about 400; and the privilege of resorting to and using the establishment is confined to them, except as to the admission to lectures. The library consists of about 18,000 volumes for the use of the proprietors and subscribers. The principal *reviews, magazines and other periodicals are taken in, together with books of reference, directories, the mining and railway journals, and railway time-tables. Of the twenty-four daily newspapers and the weekly newspapers, so taken in, some are filed; and the rest are sold, at a reduced price, for the benefit of the Institution. Lectures are delivered, during the season, on various subjects connected with science, literature and the arts. The public are invited to attend them by advertisement in the newspapers, and are admitted on paying for their admission. The Society is possessed, besides the building, of 4,000*l.* in the public funds, and is supported in part by the rents of baths and wine cellars. The rules provide that each proprietor shall pay an annual subscription of one guinea. Persons, not being proprietors, admitted as annual subscribers, pay two guineas each per annum. The whole income of the Society is applied in defraying the expense of repairs of the building and other expenses of the Institution. And, by a rule made in 1847, doing away with the right which the proprietors before had to a dividend, it was declared that no dividend, gift, division or bonus, in money or otherwise, can be made unto or between any of the members. There has been a certificate, under the Act referred to, that the Society is entitled to the benefit of this Act.

We are of opinion, however, that we ought to give judgment for the respondents. It is unnecessary to decide whether this be a society supported in part by annual voluntary contributions, within the meaning of the Act. There may be ground for contending that contribution here does not mean a voluntary annual subscription or payment of money for value received, *or expected to be received, by the party paying, but means a gift made from disinterested motives, for the benefit of others; as it is used in the translation of St. Paul's Epistle to the Romans (1); "It hath pleased them of Macedonia and Achaia to make a certain contribution for the poor saints." The Legislature may have intended to throw an additional burden on the other ratepayers of the parish, by exempting from rateability property before rateable,

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only where it is occupied for the purposes of a society supported in part by charitable donations, and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuits may be the cultivation of science, literature or the fine arts. According to this construction of the statute, where the society is instituted for purposes of science, literature or the fine arts exclusively, it would still be necessary to inquire whether the annual voluntary contributions, by which the society is supported wholly or in part, are or are not merely the purchase money for benefits to which the contributors thereby entitle themselves.

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But we are of opinion that the Russell Institution is not a "society instituted for purposes of science, literature, or the fine arts exclusively." One of the purposes was the establishment of a reading room. Now this was not a room in which the members and subscribers might read books taken from the shelves of the library, but where they might read twenty-four daily newspapers, the directories, and the railway time-tables. In such publications, besides interesting political, commercial and fashionable intelligence for gratifying curiosity, there may often be found valuable essays on science *and literature, and able criticisms to improve the taste of the reader in the fine arts. But news must be considered their chief staple; and, from the statement in the case respecting this room, the great object of its establishment seems to be to give the members the amplest means for learning and discussing the news of the day. The object may be very laudable; but we cannot think that the members, while so employed, can fairly be considered as cultivating science, literature or the fine arts. We think that the present case cannot be distinguished from *Reg. v. Gaskell* (1), where, there being a society with a library, and a news room supported by annual voluntary subscriptions, the COURT (including PATTESON, J.) held clearly that it was not entitled to the exemption. Here it is stated that lectures are delivered in the season to members; strangers, who choose to pay, being admitted: but this cannot impress upon the Institution the exclusive character of being devoted to science, literature or the fine arts.

The Russell Institution flourished before claiming the exemption; and we hope that, notwithstanding this decision, it will long continue to flourish.

(1) 83 R. R. 545 (16 Q. B. 472).

Bodkin applied for costs.

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The COURT postponed their decision. On the ensuing day, Lord CAMPBELL, Ch. J., said: I have consulted my brethren; and we are all of opinion that in such cases the general rule should be to give the victor costs. There is no ground for making the present case an exception.

Judgment for the respondents, with costs.

PHELPS v. PREW.

(3 EL. & BL. 430—443; S. C. 2 C. L. R. 1422; 23 L. J. Q. B. 140; 18 Jur. 245; 2 W. R. 258; 22 L. T. O. S. 285.)

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Defendant, at the trial, called on a person, served with a *subpœna duces tecum*, to produce a deed; he declined, on the ground that he held the deed as attorney for a mortgagee, and that his client had directed him not to produce the deed, which was one of his title deeds; and the Judge allowed the privilege. Defendant did not call the client as a witness, but proceeded to offer secondary evidence of the contents of the deed. The Judge received the evidence. In the course of the evidence it became necessary to show the identity of the instrument, which the attorney refused to produce, with one which the witnesses, called to prove its contents, had seen. For this purpose the Judge compelled the attorney to show the indorsement on the back of the deed; the attorney and also the plaintiff objecting. Defendant had a verdict. On a motion for a new trial:

Held, that a sufficient foundation had been laid for the reception of secondary evidence without calling the client himself on the speculation that he might waive his privilege.

Held, also, that the Judge did right in compelling the production of the deed for identification in the manner mentioned, as that did not involve any disclosure of its contents.

Semble, that, if he had violated the privilege of the mortgagee, it would have been no ground for a new trial at the instance of the party to the cause.

THE declaration averred that Thomas Poole had an estate for life in certain premises in right of his wife, and demised them by deed to defendant for a *term of years, by which deed defendant became bound to keep the premises in repair during that term. That, during the term and during the life of Poole and his wife, Poole and his wife assigned to plaintiffs all their interest &c. in the reversion in the premises. Averments of the continuance of the lives of Poole and his wife, and of performance of all things necessary to entitle the plaintiff to have the covenant to repair performed by defendant. Breach that defendant, during the term, did not keep the premises in repair.

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Pleas. 1. That Thomas Poole had not an estate for life in the

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premises in right of his wife. 2. That plaintiffs were not during the said term grantees or assignees of the said tenements or of the reversion therein within the true meaning of stat. 32 Hen. VIII. c. 84. Issues thereon. There were other pleas not material to the questions discussed in banc.

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On the trial, before Martin, B., at the last Assizes for Somerset, it appeared that, in 1845, Poole and his wife, being in actual possession of the premises, demised them to defendant by deed for seven years from 25th March, 1846, with a covenant in the lease by defendant to keep the premises in repair; and that, on 1st October, 1851, Poole and his wife by deed conveyed all their estate in the premises to the plaintiffs. It was proved that defendant entered and enjoyed the premises for the whole term, and that the premises after 1851 were out of repair. The deed of conveyance to plaintiffs recited that the premises were subject to and charged with certain mortgage debts: and the *habendum* was, To hold to plaintiffs "subject and charged as hereinbefore mentioned." There was nothing in the conveyance showing whether these mortgages were or were not prior in date *to the lease to the defendant, nor anything expressly showing that the mortgages were legal mortgages. An objection was made on the part of the defendant that this deed did not prove the assignment of a legal reversion to plaintiffs. The learned Judge refused to stop the cause on this ground: and the defendants proceeded to prove, as their case, that, between the execution of the lease and the assignment, Poole and his wife had, in December, 1846, conveyed their interest in the premises by way of mortgage to a third person, and consequently that the immediate reversion did not pass to the plaintiffs. For this purpose a gentleman of the name of Dent was called on, under a *subpœnâ duces tecum*, to produce a deed of December, 1846. He stated that he had in Court a deed of that date, but that it was in his custody as an attorney, and that his clients had instructed him not to produce the deed, which was one of their title deeds. He therefore refused to produce it. The learned Judge allowed the privilege claimed. The defendant then called a witness who proved that, in December, 1846, he had seen in London a deed, and a draft from which the deed had been prepared, which he had compared with the deed, and which draft he now had in Court. The witness saw this deed executed by Mrs. Poole. As the points, on which the judgment of the Court turned, depended upon the manner in

which the deed which this witness saw in London was identified with the deed which the witness Dent refused to produce, it is requisite to detail a portion of the course of proceeding at Nisi Prius, as reported to the Court by the learned Judge. The questions specified below were put by the defendant's counsel, and were severally formally objected to by plaintiffs' counsel.

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Q. What, as far as you recollect, are the parcels in that deed? The Judge thought that question could not then be put.

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Q. As far as you recollect, who were the parties to that deed? The Judge thought that question could not then be put.

Q. Did you look at the deed sufficiently to be able to tell who appeared to be the persons who had put their hands and seals thereto? The Judge permitted this question to be put. Answer: I did.

Q. Who were the persons who appeared to have executed the deed? The Judge permitted this question to be put. The substance of the answer was, that, when the witness first saw the deed, it purported to be executed by Mr. Poole and by him only, and that the witness afterwards saw it executed by Mrs. Poole and the other parties.

The question was then asked, What were the contents of the deed? It was objected: 1st, that no foundation had been laid for giving secondary evidence of the contents of the deed in Mr. Dent's custody, inasmuch as Mr. Dent's client had not been called, and, if he had been present, he might have waived his privilege and allowed the deed to be read; and, 2nd, that the evidence of the contents of the deed, seen in London in 1846, was not evidence of the contents of the deed which now was in Mr. Dent's custody, inasmuch as it was not shown to be the same deed. The learned Judge overruled the first objection: and, to obviate the second, he directed Mr. Dent to produce the deed and permit the witness to see the outside, and read the indorsement on it, but not the deed itself. Both Mr. Dent and plaintiffs' counsel objected to this; but, in obedience to the Judge, *it was done. The witness identified the deed by its indorsement, and then was permitted to give secondary evidence of its contents, which showed that the reversion had been conveyed away by way of mortgage, after the lease and before the conveyance to plaintiffs.

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The learned Judge then directed a verdict for the defendant on the second issue, with leave to move to enter a verdict for plaintiffs, if there was no evidence for the defendants which ought to have gone to the jury on the second issue. *Montague Smith* obtained a

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rule *nisi* to enter the verdict accordingly, or for a new trial on the ground that the evidence of the contents of the mortgage deed was improperly admitted.

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Crowder and *Barstow* showed cause, and argued that the recital in the conveyance to plaintiffs, that the premises were subject to mortgage charges, showed that the subject-matter of the conveyance to plaintiffs by Poole and his wife was an equitable interest only. And, inasmuch as the covenants could run only with a legal reversion, they contended that, whether the secondary evidence was admissible or not, the verdict for defendants ought to stand. The Court called on *Montague Smith* and *Prideaux* to answer this objection; and they were heard on February 7th (1). They argued that defendant, being estopped, as against the original lessors, to deny that they had a legal reversion, was also estopped as to their privies: and that, as there was no evidence in the conveyance of 1851 that the mortgages were subsequent to the lease, the plaintiffs must be taken to be such privies. *They also argued that the charges might, for aught that appeared, be merely equitable. As the Court expressed no opinion on these points, the arguments upon them are omitted. The following authorities were mentioned: *Green v. James* (2), *Doe d. Welsh v. Langfield* (3), *Pargeter v. Harris* (4), *Bayley v. Bradley* (5), *Doe d. Prior v. Ongley* (6), Com. Dig. Estoppel (D).

At the conclusion of the argument on these points, the Court took time to consider till the next day whether they would hear the further points argued. On this day, without expressing any opinion on the other points in the case, counsel were called on to argue the point as to the admissibility of secondary evidence under the circumstances.

Crowder and *Barstow* :

Upon this part of the case two points are made by the plaintiffs. They do not dispute that, if a person having a privilege to retain a deed insists upon his privilege, the litigant who cannot enforce the production of the deed may give secondary evidence of its contents. But it is said that the defendant in this case called only the attorney who had the actual custody of the deed, and

(1) Before Coleridge, Wightman,
Erle and Crompton, JJ.

(2) 55 R. R. 753 (6 M. & W. 656).

(3) 73 R. R. 593 (16 M. & W. 497).

(4) 68 R. R. 547 (7 Q. B. 708).

(5) 75 R. R. 764 (5 C. B. 396).

(6) 84 R. R. 436 (10 C. B. 25).

that he ought to have called the client whose privilege it was. There is no case laying down any such rule. On principle, the party is not permitted to give secondary evidence till he has exhausted all reasonable means of obtaining the primary evidence. He is not bound to exhaust all possible means. And surely, when an attorney refuses to produce his client's title deed, and gives evidence *that he does so by his client's order, that is sufficient reasonable ground to justify a Judge in admitting secondary evidence. The rule was granted in deference to the suggestion thrown out in *Doe d. Gilbert v. Ross* (1), which was alluded to in the judgment in *Newton v. Chaplin* (2). In neither case did the point arise; and in neither judgment does it appear which way the opinion of the Court inclined. Then, further, it is said that, supposing a proper foundation for secondary evidence to be laid, the mode by which the instrument was identified was improper. But as to that there are two answers. First, the learned Judge did not compel the witness to show the contents of the title deed, but only to allow the outside to be seen for the purpose of identification; and that was no breach of the privilege. Secondly, if it was a breach of the privilege of the witness or of his client, that would be a ground of complaint on their part, but it was no wrong to the plaintiff; PATERSON, J. states this very clearly in his judgment in *Doe d. The Earl of Egremont v. Date* (3).

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Prideaux, in support of the rule :

In *Volant v. Soyer* (4) the Court of Common Pleas held that it was part of the privilege to refuse to allow the Judge to inspect a deed, which was alleged to be a title deed.

(CROMPTON, J.: I would not be understood to throw the least doubt on that position. It is at least as objectionable that a Judge should pry into a person's title deeds as any one else; perhaps more so, as there is a greater probability of his understanding the defect in the title, if there is one. But is the indorsement on the back of the deed *any part of it? You must always ask the introductory question, Have you such a deed? and the witness must answer, Yes, before you can ask him to produce it. If he refuses to produce it, you must not ask its contents: but may you

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(1) 56 R. R. 639 (7 M. & W. 102, 122).

(2) 84 R. R. 603 (10 C. B. 356, 368).

(3) 61 R. R. 326 (3 Q. B. 609, 618).

(4) 93 R. R. 513 (13 C. B. 231).

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not make the introductory question more precise by asking whether the deed which he refuses to produce has an indorsement on the back?

WIGHTMAN, J.: Suppose that, instead of saying that he could identify the deed by the indorsement on the back, the witness had said he should know the deed again because he had spilt a bottle of red ink over it, and it had a great red blot on the back. Would you say that it was an infringement of the privilege to ask whether the title deed not produced had a red blot on it?

It would seem that the privilege is to refuse to produce the deed at all: *Brard v. Ackerman* (1), *Volant v. Soyer* (2).

(CROMPTON, J.: Supposing the evidence to have been improperly obtained, is it not still evidence? Is it not like the cases in which records improperly obtained from the Old Bailey are yet admissible (3)?)

In *Doe d. The Earl of Egremont v. Date* (4) Lord DENMAN, Ch. J., expresses a strong opinion that the decision of the Judge on such a point might be reviewed at the instance of the party against whom the evidence was improperly produced. And at all events a proper foundation was not laid for the admission of secondary evidence, as the client was not called, and, unless he was called, all means of producing the instrument were not exhausted. The attorney could not waive the privilege: *Taylor v. *Blacklow* (5): the client might: *Merle v. More* (6). The fact of the client not being in attendance, and not producing the deed, affords no ground for the admission of secondary evidence: *Reg. v. Llanfaethly* (7).

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COLERIDGE, J.:

I am of opinion that the rule must be discharged, without its being necessary to come to any decision on the points first argued. The points which have been argued to-day are two. The first is, that secondary evidence of the contents of the mortgage deed was not under the circumstances admissible, because the defendant had not done all that he might to exhaust the sources of primary

(1) 5 Esp. N. P. C. 119.

(2) 93 R. R. 513 (13 C. B. 231).

(3) See *Legatt v. Tollervey*, 12 R. R. 518 (14 East, 302); and *Jordan v. Lewis*, 13 R. R. 520, n. (14 East, 305, n.).

(4) 61 R. R. 326 (3 Q. B. 609).

(5) 43 R. R. 626 (3 Bing. N. C. 235).

(6) Ry. & M. 390.

(7) 95 R. R. 915 (2 El. & Bl. 940).

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evidence. As to that, the facts were, that the attorney was called, and refused to produce the deed, and stated that he did so because it was one of his client's title deeds, and his client had given him directions not to produce it. It is not contested that, where a document is properly withheld on the ground of the privilege of the person having the custody of it, secondary evidence is admissible; but it is said that, if the client had himself been present, he might have waived the privilege, and allowed the instrument to be produced when called for. Questions of this sort are all resolvable into whether it was reasonable in the Judge at Nisi Prius to require more to be done; and, in this case, I think it would not have been reasonable; for there was distinct evidence that the client had ordered the attorney not to produce the deed; and nothing was shown to lead to the conclusion that if he had been present he would have altered his orders.

But it is further said that the Judge improperly *infringed the privilege, by compelling the attorney to produce the instrument for the purpose of identification; and *Mr. Prideaux* argues that the mere production for any purpose is a breach of the privilege. I think, however, it depends upon the circumstances. I agree with him, that the proposed process of identification may at times involve a disclosure of the contents of the instrument; it did so in *Brard v. Ackerman* (1); and, when it does, it is objectionable. But, in the present case, it did not involve any disclosure of the contents, and was like the case put, of disclosing that there was a blot of red ink on the back of the deed, which *Mr. Prideaux* was forced to contend would be objectionable. Thinking, as I do, that nothing wrong was done by the Judge, it is unnecessary for me to come to any decision on the question whether the Judge's decision on a question of the privilege of the witness may be reviewed at the instance of the party. I would not however be understood to countenance the idea that it can be so reviewed: my impression is rather the other way.

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WIGHTMAN, J. :

In this case it appears that the defendant proposed to show the legal estate outstanding in a third party, as mortgagee, and for that purpose called the attorney of that party, who refused to produce the deed, and stated that he did so by order of his client, the supposed mortgagee; and the privilege was allowed. But, in order

(1) 5 Esp. N. P. C. 119.

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to give secondary evidence of its contents, it became necessary to identify the deed which was not produced with that which the defendant proposed to prove. Now it is said that the privilege is, not to produce the instrument. *I doubt that, if the words are understood in the sense that he may refuse to show the deed ; it seems that his privilege is only not to produce the instrument for the purpose of disclosing its contents. It is a possible thing that the man may not have the instrument, which it is sought to prove, at all ; and there may be many other cases in which it may be necessary to produce the instrument for the purposes of identification. The objection here is that the witness was compelled to show the deed and permit an inspection of the indorsement on its outside : but, as that was only for identification, I am of opinion it was no breach of his privilege.

Then it is said that enough was not done to admit evidence of the contents of the instrument, and that the mortgagee himself ought to have been called to ask if, notwithstanding his previous directions not to produce the deed, he would now consent to produce it. There is no authority for such a position ; for in no case cited did it appear that the client had given directions not to produce the instrument. I think it might be assumed that he continued in the same mind, and that it was unnecessary to call him on the chance that he had repented. And, all being done that could reasonably be required to be done to obtain the primary evidence, the secondary evidence was admissible.

ERLE, J. :

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The question is, whether this mortgage deed was taken out of the general rule which requires that written instruments shall be produced in evidence, by being shown to be within the exception of being a title deed the owner of which insists on his privilege. And the first question must be, whether the attorney was competent *to prove that his client, the mortgagee, forbade him to produce the mortgage : and I think he was competent. Next, did the Judge violate the privilege ? Now all rules must be construed with reference to their object. The object of the rule requiring the production of original evidence is, to prove the truth. The object of the privilege as to not producing title deeds is, that the title may not be disclosed and examined. The identity of the deed was a fact material to be proved. Was there any disclosure of the title by allowing the outside of the deed to be examined for the purpose of identification ? I think not : and I am therefore of opinion that the

privilege claimed, not to permit it to be seen, was not within the reason of the rule.

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As at present advised, I think the party cannot complain of the breach of the privilege of the witness : but, as the privilege was not infringed, it is not necessary to decide that.

CROMPTON, J. :

It is admitted that, if the Judge did right in admitting secondary evidence, the evidence is sufficient to entitle the defendant to his verdict ; and therefore the question comes to be, whether the Judge did wrong. It is said he did wrong in compelling the production of the deed for the purpose of identification. I think that was no breach of the privilege : but, if it had been, I at present entertain a very decided opinion that the party would have no ground of complaint, and that the person who has had an instrument read at the trial cannot be deprived of the benefit of that evidence on the ground that the instrument was improperly obtained from a third person, whether that was the fault of the Judge, the witness, or the party himself. The authorities *are strong in support of this ; for in *Doe d. The Earl of Egremont v. Date* (1) it was only one Judge who doubted, the other two being *contra*. And I can see no reason why the plaintiff should be entitled to insist upon the witness's privilege. If therefore it were necessary to decide the point, I should be strongly of opinion that a mistake of the Judge on such a point is not a ground for a new trial, where the evidence has been admitted. Then there is a second point, as it is urged that there is a positive rule that, under such circumstances as these, you must call the client, to see if he will not repent and retract his refusal to produce the deed. I think that would be a most inconvenient rule ; for an attorney may hold the deed as attorney for a great many persons, as, for instance, not only for the mortgagee, but for many subsequent incumbrancers ; and it would be very hard upon the party, if at the trial he were to be debarred from giving evidence, unless he subpoenaed all those, of whose interest he might never have heard till the attorney named them, on being called on to produce the instrument. I agree with my brother COLERIDGE that the real rule is, that, before giving secondary evidence, you must reasonably prove that you cannot produce the original because of the privilege, and you must prove that to the satisfaction of the Judge who tries the cause. As to *Reg. v. Llanfaethly* (2) : my brother ALDERSON, in *Jesus*

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(1) 61 R. R. 326 (3 Q. B. 609).

(2) 95 R. R. 915 (2 El. & Bl. 940).

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College v. Gibbs (1), speaking of a document in question in that suit, says: "You could not have proved it by secondary evidence, unless the document had been in the possession of a party not bound to produce it. You cannot produce secondary *evidence of a document, if a witness refuses to produce the original. He does it, it is true, at his own peril; but you have no remedy, except an action against him." And the decision in *Reg. v. Llanfaethly* (2) seems to be an application of that doctrine, for which I believe these are old authorities, but which is a principle not applicable to the present case.

Rule discharged.

1853.
Nov. 10.
1854.
Feb. 18.

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REG. v. LONDON AND NORTH WESTERN RAILWAY COMPANY (3).

(3 EL. & BL. 443—476; S. C. 23 L. J. Q. B. 185; 18 Jur. 993; 22 L. T. O.S. 346.)

Notice was given by D. to a Railway Company that by their works they had permanently obstructed a way to the use of which D. was entitled as appurtenant to a messuage belonging to D.: whereby D. was prevented from enjoying the way, and his interest in the messuage was injuriously affected: and the Company were required, in default of their agreeing to pay to D. a sum named, to issue their warrant to the sheriff to summon a jury to assess compensation.

The Company issued a warrant, reciting the notice, stating that they did not admit D.'s right to the way, or the damage, or the injurious affection; but that they were willing that the amount of the said compensation should be settled as requested in the notice; and they required the sheriff to summon a jury to determine by their verdict the amount of the compensation in respect whereof D. by his notice had required the Company to issue their warrant.

The sheriff summoned a jury to try the question in dispute in the warrant. At the inquiry, the jury having been sworn to inquire and assess the compensation and damages in the warrant mentioned, evidence was given for and against the existence of the right. D. insisted that the existence of the right was to be taken for granted on the inquiry, and, further, that the right was proved. The Company insisted that the right was disproved, and that the jury ought to be told that D. was not entitled to any compensation.

The sheriff told the jury to say whether D. was entitled to the way; but, if they negatived this, to say what was the compensation to be paid on the assumption that the right existed.

The jury found that the right of way did not exist, and that on that ground D. had not sustained any damage: but, on the supposition that they

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| (1) 1 Y. & C. Ex. 145, 156. | <i>Board of Works</i> (1870) L. R. 5 Ex. 221, 39 L. J. Ex. 130, 23 L. T. 255; |
| (2) 95 R. R. 915 (2 EL. & BL. 940). | <i>Rhodes v. Airedale Drainage Commissioners</i> (1876) 1 C. P. D. 380; <i>Great Northern, &c. Rail. Co. v. Tillet</i> [1902] |
| (3) <i>Reg. v. Metropolitan Rail. Co.</i> (1863) 4 B. & S. 315, 32 L. J. Q. B. 367; <i>Beckett v. Midland Rail. Co.</i> (1866) L. R. 1 C. P. 241, 35 L. J. C. P. 163; <i>Bucclough v. Metropolitan</i> | 1 K. B. 874, 71 L. J. K. B. 525, 86 L. T. 723. |

were to assume its existence, they settled the compensation at 150*l*. This finding was specially incorporated in the verdict; and the sheriff gave judgment thereon that D. had not sustained any damage.

This Court, on the application of D., quashed the inquisition, verdict and judgment, upon *certiorari*: holding:

1. That the jury, under sect. 68 of the Lands Clauses Consolidation Act, 1845, had no power to inquire into the right of D. to the way, but were bound to assess compensation upon the assumption that it existed.

2. That the verdict was totally bad, and could not be rejected as to the negating the right but stand as to the conditional assessment of the amount.

Per Lord CAMPBELL, Ch. J., COLERIDGE and WIGHTMAN, JJ.: *dissentiente* ERLE, J., who held that the jury had power to inquire into the right.

HUGH HILL, in last Easter Term, obtained a rule calling on the London and North Western Railway *Company to show cause why a writ of *certiorari* should not issue, to remove into this Court the record of a verdict and judgment given upon an inquisition taken by the Sheriff of Warwickshire, on 13th April, 1853, by virtue of a warrant of the said Company, dated 17th February, 1853, directed to the said sheriff, to summon a special jury to determine by their verdict and settle the amount of the compensation to be paid to Charles Dollman and Peter Pitt, in respect whereof they had by their notice and claim required the Company to issue their said warrant.

From the affidavit on which the rule was obtained it appeared that the Company, under the powers of stat. 9 & 10 Vict. c. cclix. (1), and in construction of the railway and works thereby authorized, in the latter part of 1851, permanently obstructed a private way leading from messuages and premises in the borough of Birmingham belonging to Charles Dollman and Peter Pitt, as lessees for a term of years, "and which way the said Charles Dollman and Peter Pitt claimed and alleged, and still claim and allege, to be a way which was of right appurtenant to and used with the same messuages and premises." The messuages and premises being (as deposed) injuriously affected by the obstruction, the attorney of Dollman and Pitt served a notice and claim on the Company: reciting that the Company had "entered upon, stopped up, blocked up, and taken away, permanently obstructed, or destroyed, a certain way, passage or road leading from certain messuages and other premises hereinafter more particularly referred to, belonging to us, the undersigned Charles Dollman and

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(1) Local and personal, public: or near to Navigation Street within
"For making a railway from the the borough of Birmingham."

London and Birmingham Railway to

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*Peter Pitt, into a certain public street in Birmingham" &c. "And the right to use such way, passage or road, for horses, carts, waggons, carriages, and also without the same, and for all other purposes, belongs to us, and has been held and enjoyed by us, and by the person or persons under whom we claim to be entitled, with the messuages" &c. And that the Company had made certain paths, buildings, &c., of a permanent character, by reason whereof, and of certain walls, &c., the way was permanently stopped up and destroyed: "whereby we, and our tenants, servants and others belonging to us, for some time past have been prevented from having the enjoyment of the said way, passage or road, and we, and our tenants, servants and others, are now prevented from having the use and enjoyment of the said way, passage or road; and whereby we, the undersigned, have been prejudiced, and are now prejudiced, in our estate and interest of and in the said several messuages" &c. Dollman and Pitt then gave "notice that we are interested in, or entitled to, the said several messuages" &c., "in respect of which we claim such way, and so injured as aforesaid, subject to such tenancies as may subsist in the same premises for the residue of a term of 99 years to be computed from" &c. "And we do hereby, in pursuance of the statutes in that case" &c., "give you, the said Company, notice that we require you to pay us compensation in respect of the said way, passage or road, which you have entered upon and taken as aforesaid, whereby our said messuages" &c., "and our estate and interest therein, have been damaged or injuriously affected as aforesaid; and for the aforesaid injuries to the same, and in respect of our estate or interest in *the said way. And that the amount of our claim for compensation by reason of the premises is 2,300*l*." That, unless the Company were willing to pay the 2,300*l*., and to enter into a written agreement for the purpose within twenty-one days, the claimants desired that the amount of compensation should be settled by a jury according to the provisions of the Act &c., and required them, in that case, to issue a warrant to summon "a jury for settling the amount of the said compensation, as in the said Act or Acts is directed and provided."

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The Company accordingly issued their warrant to the sheriff, reciting the notice, and adding: "And whereas we do not admit that the said Charles Dollman and Peter Pitt are interested or entitled as in the said notice mentioned, or that the claim to the said way is a valid claim, or that they are entitled to compensation

in respect of the matters in the said notice and claim specified or that such damage or injurious affection, as in the said notice is supposed, has arisen or accrued: yet, being willing that the amount of the said compensation shall be settled as in and by the said notice and claim is requested: Therefore, we the said Company do, by this warrant under our common seal, according to and in pursuance of the Lands Clauses Consolidation Act, 1845, and the Act" &c. (9 & 10 Vict. c. ccclix.), "and in pursuance of the said request in that behalf contained in the said notice and claim of the said C. D. and P. P., require you, the Sheriff of Warwickshire, to summon a special jury to determine by their verdict and settle the amount of the compensation in respect whereof the said Charles Dollman and Peter Pitt have by their said notice and claim *requested and required of us to issue our warrant to you."

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The sheriff accordingly summoned a jury to try the question in dispute in the said warrant. The inquiry was held at Birmingham, before the undersheriff, assisted by counsel as assessor: and the claimants and the Company appeared by counsel respectively. Evidence was given as to the existence and user of the way. The counsel for the Company contended that there was no evidence of such right of way as was claimed, and called on the assessor to direct the jury that the claimants "were not entitled to any compensation." The counsel for the claimants contended that "it was not competent for the undersheriff or the jury on that inquiry to determine the question whether, as matter of law, such right of way did or did not exist; and that the functions of both, as regarded that inquiry, were limited to determining by their verdict, and settling, the amount of compensation according to the exigency of the said warrant on the assumption that such right did exist:" and further that, the existence of the way, the stoppage and the deterioration in value having been proved or admitted, the only question was the amount of compensation for such damage and injury. The assessor directed the jury "to say, by their verdict, whether there was any such way as claimed before and at" &c. (directing their attention to points of time with respect to which the objection to the right was urged); adding that, if they found in the negative, he was of opinion, and should direct them, as matter of law, that there was no legal right of way to which the claimants were entitled: but, at the same time, he directed them also to say what, on the assumption *that such right of way did exist, was the amount of compensation to be paid by the said Company to the

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claimants in respect of such damage and injury occasioned by the stoppage thereof." The jury found: "That there was no way such as claimed existing at" &c. (the points of time before mentioned); "but that, on the supposition that they were to assume the existence of such legal right of way for the purposes of the said inquiries, they settled the amount of compensation at 150*l*." The following instrument was then executed.

"Warwickshire to wit. A verdict and judgment delivered and given in Birmingham, in the county of Warwick, this 18th day of April, 1853, by virtue and in pursuance of the Lands Clauses Consolidation Act, 1845, and of an Act" &c. (9 & 10 Vict. c. cciv. (1)), "and of another Act" &c. (9 & 10 Vict. c. ccclix.), "upon a certain inquisition held before" &c. (the sheriff), "upon the oaths of" &c. (the jurors), "good and lawful men of the said county, qualified" &c., "and now here duly impannelled and sworn by the said sheriff, under and in pursuance of a certain warrant hereunto annexed" &c., "directed to the said sheriff, and delivered by the said Railway Company to the said" &c. (the sheriff), "as such sheriff, to be executed in due form of law."

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"Warwickshire to wit. Be it remembered that heretofore, to wit on" &c. The warrant was then recited, the delivery of it to the sheriff, the summoning by him of the claimants and the Company, for the purpose of striking a special jury, their attendance accordingly, the *striking of a special jury "for the purpose aforesaid, in manner directed by the said Act," the reduction of the jury to twenty, the summoning of the jury, the appearance of the parties, the coming of eleven jurors, and the consent of the parties that the question in dispute in the said warrant mentioned shall be determined by the verdict of a jury consisting of" &c. (the eleven). "And thereupon the said" &c. (the jurors) are now here duly impannelled and sworn by me, the said sheriff, by and with such consent as aforesaid, and do make oath before me, such sheriff as aforesaid, truly and faithfully to inquire and assess the compensation and damages in the said warrant mentioned: and, having viewed the said several messuages, tenements and other hereditaments in respect of which the question in dispute in the said warrant mentioned has arisen, and having heard what was alleged by the counsel learned in the law for both the said parties, and the evidence adduced before them, the said

(1) Local and personal, public: "To consolidate the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies."

jury: they, the said jury, upon their oath as aforesaid, do say that the said Charles Dollman and Peter Pitt were not, at the time of the said construction by the said London and North Western Railway Company of the said railway, or extension, and the station, works and conveniences connected therewith, in the said notice mentioned, entitled to, nor had they, any such right of way as in the said notice mentioned, or any right of way whatever leading from the messuages" &c., "in the said notice referred to, into a certain public street in Birmingham" &c., "as in the said notice they claim to have had and enjoyed. And, on that ground, the said jury do find and determine that the said Charles Dollman and Peter Pitt have not sustained any damage whatever by the said execution *of the said works of the said Company. But the said jury further say that, if they are obliged by law to assess and determine the amount of compensation payable to the said C. D. and P. P., in respect of the said works of the said Company, upon the assumption that, at the time of the said construction thereof, the said C. D. and P. P. were entitled to the said alleged right of way, and that the same was obstructed and obliterated by such works as mentioned in the said notice, then, and in such case only, they the said jury do assess the amount of such compensation at the sum of 150*l*. Which said verdict I, the said sheriff, do hereby sign, according to the form of the statute in such case made and provided."

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(Signature of the sheriff.)

"Which said verdict being so as aforesaid given and signed: Now therefore I, the said sheriff, before whom the said inquisition hath been holden, do hereby, at Birmingham aforesaid, on the day and year first aforesaid, in pursuance of the statute in that behalf made and provided, pronounce and give judgment upon the said verdict: That the said Charles Dollman and Peter Pitt have not sustained any damage whatever by the said construction of the works of the said Railway Company.

"In witness whereof, I" &c. (signed and sealed by the sheriff).

In last Michaelmas Term (1),

Sir F. Kelly, Mellor and Bovill showed cause; and *Hugh Hill* and *Willes* were heard in support of the rule.

(1) November 10, 1853. Before Lord Campbell, Ch. J., Coleridge, Wightman and Erle, JJ.

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The course of the argument will fully appear from the judgments.

Cur. adr. vult.

In this vacation (February 18th), there being a difference of opinion on the Bench, the following judgments were delivered *seriatim*.

ERLE, J. :

Upon a motion for a *certiorari* to remove an inquisition held under the Lands Clauses Consolidation Act, 1845 (1), sect. 68, for settling the amount of compensation that might be due from the Railway Company to the landowner in respect of lands alleged to be injuriously affected by reason of an obstruction of a private way said to be appurtenant to the lands, the question has been raised, whether, on such an inquisition, there is jurisdiction to try the existence of such a right of way.

The landowner alleges that there is no jurisdiction : and he relies upon the words of the section, “ if any party shall be entitled to any compensation in respect of any lands ” “ injuriously affected,” “ such party may have the ” amount “ settled by ” inquisition. These words, he contends, import that the title to the compensation is a condition precedent to the power to hold the inquisition ; and that, therefore, the injurious affecting described in the claim must be taken to be admitted as the title to that compensation, and the inquiry consequently confined to settling the amount which ought to be paid in the event that the claim of the alleged way should in a future action be proved to be true. And, in *further support of this construction, he observes on the inconvenience (2) likely to arise from the opposite construction in allowing a tribunal to try a right of way, which is supposed to be incompetent for that duty.

But I am of opinion that upon this inquisition there was jurisdiction to try the right of way, as incidental to the question of the amount of compensation to be paid for lands injuriously affected.

(1) Stat. 8 & 9 Vict. c. 18.

(2) As to the weight of this consideration, reference was made in argument to *Reg. v. The Eastern Counties Railway Company*, 2 Dowl. N. S. 945. As to the extent of discretion to be exercised by the Court,

in granting a *certiorari*, reference was made to *Reg. v. The Manchester and Leeds Railway Company*, 8 Ad. & El. 413 ; and *Reg. v. The Committee Men for the South Holland Drainage*, 47 R. R. 618 (8 Ad. & El. 429).

Throughout the legislation on this subject, the title to the land is kept distinct from the rights belonging to that land. Upon the title depends the person who is to receive the compensation: upon the rights depends the *quantum* of compensation to be paid.

With respect to the title to the land, provision is made to constitute a party litigant to meet the Railway Company, and settle the amount that is to be paid: and, if this party litigant represents parties who would be under disability from acting, or if he turn out to have no valid title, the amount so settled is to be paid either into Chancery, or over in such other way that the parties entitled shall, after their title has been ascertained by the proper tribunals, receive their due. Then also, in respect of the amount to be paid, provision is made to enable the Railway Company to settle speedily and finally what that amount is, so that, by paying it over either to the claimant or in the statutable way, they may become owners, and carry on their works without *delay or doubt; that prompt and final settlement of the amount, without the risk of protracted litigation, being also of great importance for the claimant where his title is undisputed, as is forcibly explained by Lord TRURO in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (1).

The provisions thus given for settling the amount are given in detail in the sections preceding sect. 68 (2), which relate to claims before the land has been taken or injuriously affected. If the claim is under 50*l.*, it is for two justices; if above 50*l.*, it is to be settled, either by agreement if the landowner and Company can agree on the amount; if they cannot, then the landowner may elect to proceed by arbitration; and, if this is rejected or fails, the amount must either be settled by a jury or the amount claimed may be taken to be the amount due, if the Company refuse to hold an inquisition and are found liable to make some compensation in an action. When the amount is thus settled before the taking or injurious affecting, by the way of agreement, the landowner will of course take into consideration all the rights of ownership that will be injuriously affected, whether ways, waters, lights or other advantages. Among these the first and almost universal matter of claim is on account of severance, which is the obstruction of the

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(1) 87 R. R. 49 (3 Mac. & G. 155).

(2) As to the incorporation of the preceding sections in sect. 68, reference was made to *South Eastern Railway Company v. Richardson*, in Ex. Ch.

(Hil. Vac. 1852), affirming the judgment of C. P. in *Richardson v. The South Eastern Railway Company*, 87 R. R. 612 (11 C. B. 154).

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previously existing power of passing from one part of the estate to another. And this power of passing may be either directly from one field to another of the same *owner, or indirectly from the one field by a right of way over the land of a third person to the other field: and such a right of way may either be used to increase the amount of compensation by the landowner, if it is to be obstructed, or to diminish that amount by the Railway Company in case the direct passage from one field to another is obstructed, but there is left open a convenient passage by means of the alleged right of way. But, if the parties cannot agree on the amount, and arbitrators are resorted to, they would have to take the same matters into their consideration, and, among the rest, the same question of the right of way. And in the remaining case, if arbitrators are not made available, and a jury is resorted to, all questions relative to settling the amount of compensation are to be inquired into and considered, and finally decided by them, in the same way and to the same extent as would have been done by agreement or by arbitration. The law appears to me to be so expressed: and the constant usage in fact, as far as I can discover, appears to have accorded with the law so understood.

It is to be noted that neither the right of way nor any other right is tried and decided in the sense in which that result would occur where the question was raised and decided between the respective owners of the dominant and servient tenements. As between them, the question would remain the same after the inquisition as before: but, as between the owner of the dominant tenement and the Railway Company, and as far as relates to the amount, if any, to be paid for injuriously affecting the supposed right by the works of the Railway Company, the question would be answered and finally disposed of. It should be further noted that, throughout these provisions *for settling the compensation before the land is taken or injuriously affected, there is no expression to prevent the jury from finding that no compensation is due. According to these provisions, the claim, if disputed, may be affirmed or negatived by the jury; and, if affirmed in whole or in part, damages may be assessed accordingly in the same manner as would occur in an action for the same grievance.

Thus a legal machinery is provided for the settlement of the amount of compensation in these different modes.

If it is done by agreement, the sections from 6 to 15 operate: if by justices or arbitration, sections 16 to 37 apply; and, if by a jury,

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sections 38 to 57 apply. And the machinery, thus fully prepared, is frequently adopted by a short reference in subsequent enactments. Thus sections 95 to 98 adopt it for copyhold lands; sections 99 to 107 adopt it for rights of common; section 124 adopts it for interests in land which were not known when the land was taken. And stat. 8 & 9 Vict. c. 20 (The Railways Clauses Consolidation Act, 1845), s. 6, adopts it, by enacting that, in exercising their powers, the Company shall be subject to the provisions and restrictions contained in the Lands Clauses Consolidation Act, and shall make to all parties interested in any lands injuriously affected full compensation for all damage sustained. And sect. 68 of the Lands Clauses Consolidation Act, 1845, is a correlative enactment to that last mentioned, giving the right to the landowner to obtain from the Company compensation in all cases not otherwise specially provided for, where lands have been injuriously affected by reason of the works of the Company. And the words of sect. 68 are express to adopt the provisions before created; for, if the claimant elects *to proceed by arbitration, the amount of compensation is to be settled "in the manner herein provided;" and, if he elects to have a jury, a warrant is to issue to summon a jury for settling the same "in the manner herein provided;" that is, in the previous sections.

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In each case the provision for constituting a party litigant to meet the Company is altered according to the circumstances. Thus for copyholders and lords of manors the provision is in analogy to that for freeholds; for commoners, a committee must be appointed to represent the body. And, as, when the amount is to be settled before the land is taken or injuriously affected, the Company are to take the initiative by sending a notice to the landowner, so when this is to be done after the taking or injurious affecting, as is the case under sect. 68, the landowner is to take the initiative by sending a claim to the Company. But in all the cases, as soon as the parties are constituted, and the question is raised, and the kind of settlement elected, the operation of the machinery provided for that kind of settlement is the same. The question depends on analogous considerations in all, and is tried and decided to the same extent and with the same result in all. The jury, on settling the question of amount, are bound to try all questions incidental thereto, such as questions of rights to ways or other easements; while effect will be given to the words "if any party shall be entitled to any compensation in respect of any lands" "injuriously affected," by holding that the

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Company may raise the question of the claimant being the party so entitled in some other proceedings.

I, therefore, think that the jury, under sect. 68, had jurisdiction on this occasion. The decisions have been *in accordance with this construction. Thus it has been held that the provisions for a special jury, and for notice of holding the inquisition, and for costs, contained in the earlier sections, are adopted by the reference to them in sect. 68, according to the authorities cited by *Mr. Hill* in his argument. And it was decided, in *Reg. v. Lancaster and Preston Railway Company* (1), that the jury might find that no damage had been sustained; in other words, that the lands had not been injuriously affected. This decision has been repeatedly cited in different Courts, uniformly with approval; and it appears to me to be expressly in point for the validity of the verdict now under consideration. The claim for compensation for injuriously affecting land by obstructing a way appurtenant thereto is in its nature a claim for severance damage. The existence of the way is incidental to the settling the amount of damage from the alleged obstruction. The Company might show that it never existed, or had been diverted, or passed in another direction, where there was a tunnel or a bridge, either to negative or diminish the amount of damage claimed: and the landowner might go into evidence to the opposite effect for a similar purpose. If the jury may legitimately decide that there was no damage, it seems to me to follow that, as incidental thereto, they might decide that no way had been obstructed; that is, that the way claimed did not exist. This decision would leave the question of the way unaffected as against all other parties except the Railway Company; and, as to that body, would only decide that the compensation due for the alleged obstruction was nothing.

[458] According to this construction of the section, the inconvenience of assessing damages subject to the contingency that the claim should be proved in an action, and, in case of failure to establish every part of the claim in the action, assessing again, subject again to the same contingency, would be avoided. All questions incidental to the amount of compensation would be finally decided by arbitration or a jury; while all questions incidental to the question of the title of the claimant to receive that amount would be for other tribunals.

With respect to the supposed inconvenience of referring to a jury, under the guidance of the sheriff, the trial of a right to an easement, one answer is, that the right is only tried as incidental to the

(1) 66 R. R. 560 (6 Q. B. 759).

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question of damages for one obstruction; and a further answer is, that the landowner need not refer it to a jury, but may elect a competent arbitrator; and, if he prefers a jury, he cannot be heard to complain of their incompetency: while the Company, if they choose to run the risk of being liable for the amount claimed, may refuse to summon a jury; and then the claimant's action for that amount would raise the question, whether the lands had been injuriously affected at all, as is mentioned in *Reg. v. Metropolitan Commissioners of Sewers* (1). And a further answer is, that the Legislature has expressly empowered the jury to try all questions incidental to the amount of compensation in the earlier and detailed sections for settling the amount, and also has referred to the same jury more complex questions of law and fact in respect of manorial profits under section 96, and of commonable rights under sect. 105. The Legislature *therefore saw no objection on account of this supposed inconvenience.

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This construction accords with the result of the cases in Chancery upon this section.

LORD COTTENHAM's judgment in *The London and North Western Railway Company v. Smith* (2) indirectly supports it. For he adopted the opposite construction, that the jury in the inquisition were to assess the amount of compensation without trying any right, and that the right was to be tried in a subsequent action; and he considered the inconvenience to be so excessive that he prohibited by injunction a recourse to the statute so construed.

LORD TAUNTON, in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (3), directly supports it, holding that the jury may try the question of right in assessing the amount of compensation. And LORD CRANWORTH also expressly so decides in an elaborate judgment in *South Staffordshire Railway Company v. Hall* (4).

In the two last cases it is laid down that, if the jury on the inquisition try a question of right over which they have no jurisdiction, the Company in an action for the amount found by the verdict may raise for trial that same question of right, and succeed if the judgment is in their favour. It seems to me that this principle so expressed is correct; but it requires further explanation to define what questions are within the jurisdiction of the inquisition, and what are not. The distinction, between questions of title to the land and right to easements and advantages belonging to the land,

(1) 1 EL. & BL. 694.

(2) 84 R. R. 50 (1 MAC. & G. 216).

(3) 87 R. R. 49 (3 MAC. & G. 155).

(4) 89 R. R. 128 (1 SIM. N. S. 373).

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is clear: and sect. 124 *of this statute affords an example, in providing compensation for the owner of an estate or interest in land which was unknown when the land was taken. In this case, if the title to the estate is disputed the question of title must be first finally established by law in favour of the party claiming it: and, if not disputed, or if established, then compensation is to be afterwards settled in the manner before provided in the Act. The statute does not declare why the trial of the title should in this case precede the settlement of the compensation, and in other cases follow it. It may be that the title to an unknown estate would be more frequently bad. But, be that as it may, the statute recognizes and provides for two different modes of trial of the two classes of questions, questions of title to land and questions of amount of compensation.

The case of *Chabot v. Lord Morpeth* (1) is a further example of the same distinction. Upon the inquisition to settle the compensation for the land of the claimant, his opponent contended that he had no title to a part of that land, and so reduced the amount of the value of the land in question by so much estate and interest as any other person possessed adverse to the claimant. The Court says that the jury "had no materials for making that reduction, or deciding whether" any other claimant "had the whole estate and interest in the premises, or none at all." The jurors' duty "was to estimate the value of the property taken," "the person in possession being deemed entitled to the whole interest until the contrary be shown (sect. 45 (2)), and the case of doubtful titles being provided for (sect. 44 (2)) quite independently *of the jury's assessment." Now, though this judgment was in respect of the Act for Battersea Park, the distinction under it is applicable to claims under the Lands Clauses Consolidation Act, 1845: and, if in that case the claimant Chabot had endeavoured to enhance the amount of compensation by alleging that easements belonged to the land, according to my understanding of the case the jury there would have had jurisdiction to try the right to such easements.

Between these two classes of questions the distinction is sufficiently marked. But in the cases in Chancery a distinction is noted between questions relating merely to the amount of compensation for injuriously affecting land, and questions relating to the legal nature of the damage to the land. Was it such as gave the claimant a legal right to compensation for that damage? In the case before

(1) 81 R. R. 680 (15 Q. B. 446).

(2) Of the Battersea Park Act,
 9 & 10 Vict. c. 38.

Lord Cottenham, the question in his mind seems to have been as to the legal right to compensation where a street in a town had been stopped up, at some distance from the claimant's house, but to his damage. Was the damage too general, and was it too remote to give a legal right to compensation? In the case before Lord Truro, part of the claim was for impeding the access of customers along a street to a shop. The doubt here might be the same. In the case before Lord Cranworth, part of the claim was for not putting gates where a farm road crossed a railroad; and for this inconvenience a specific remedy was given in the statute. And it was said that the claimants should pursue that remedy, and so had no right to compensation.

It was in respect of this class of questions, when the title is admitted and the damage in fact is admitted, but the right to compensation for such damage is denied, that *the two last mentioned Judges expressed an opinion that, if the jury upon the inquisition tried them and found for the claimant, and gave damages, still the Railway Company could raise them again in an action by the claimant for the amount found by that verdict. According to this opinion, the finding of the inquisition against the claimant upon any question within this class would be final, but a finding in his favour upon it would be open to review in an action. And Lord Truro's observations in favour of that right in the Railway Company will be found worthy of attention when the question shall arise.

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But in the present case the question is not raised. The Railway Company admit the title to the land, but deny that it has been in fact injuriously affected; which they have a right to do, according to *Reg. v. Lancaster and Preston Railway Company* (1). And, if in support of their denial they disprove an alleged right of way, or any other alleged advantage in respect of which the claim for damages was made, they are, as it seems to me, within the limits of the jurisdiction of an inquisition for compensation under this statute.

It follows that in my judgment the present rule should be discharged.

COLERIDGE, J. :

This was a rule for a *certiorari* to remove an inquisition, which had been taken by the Sheriff of Warwickshire upon a claim of compensation in respect of obstruction to a right of way, which Messrs. Dollman and Pitt insisted on as appurtenant to certain

(1) 66 R. R. 560 (6 Q. B. 759).

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premises of which they were possessed as termors. *The defendants denied their right to the premises, the existence of the right of way, and also disputed the amount, 2,800*l.*, which Messrs. Dollman and Pitt claimed for compensation. The notice of the claim, however, being given under the Lands Clauses Consolidation Act, 1845, sect. 68, and a refusal to issue the warrant to the sheriff involving the risk of paying the whole amount claimed, should the claimants establish their right to any thing in an action, the warrant was issued. Before the jury, the claimants, who had to begin, after protesting against being called on to give evidence of any thing but the amount of damage, did in fact go into their whole case. The defendants met that case by evidence. The sheriff's assessor held that the jury were competent to try all the questions, and left them to their decision. The jury found in the nature of a special verdict, negating the right of way, but awarding contingently 150*l.* for compensation.

In showing cause, two points were made: 1st. That the assessor's direction to the jury was right, and that the jury was competent to try the question of title; 2nd. That, even if not, their verdict for 150*l.* might stand, rejecting the other part as surplusage.

This latter point was not much pressed: and we may dispose of it first and shortly. It appears to me that there was much in one answer made by *Mr. Willes*, that we cannot feel sure that the jury have dealt with the question of value on the assumption that there was no right of way, in fact, as they would have done if they had taken for granted that there was. Such a question would very probably present itself to their minds in a very different way after an inquiry, and a conclusion in their minds that the claim was *unfounded, from that in which it would have done if it had come to them neatly and without prejudice. But, besides this, there are formal difficulties in the way of so dealing with the finding. The sheriff has given judgment upon the verdict as returned; he has signed both verdict and judgment; and they are now become records, not of this Court, nor within our jurisdiction to amend; they are made evidence: and it might lead to great confusion if we were to sanction the notion that any distinct finding in fact is to be considered merely as surplusage under such circumstances as these. This answer to the rule, therefore, cannot be sustained; and it is necessary to decide upon the main and very important question of the extent of the province of the jury.

The 68th section of the Lands Clauses Consolidation Act, 1845,

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8 & 9 Vict. c. 18, on which the question turns, commences in this way: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," "and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit."

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The person, then, who may proceed under this section is one who is entitled to compensation. About this there can be, and we believe has been, no question: it must be a condition, whether precedent or subsequent, to his deriving any benefit from its provisions. But this, being assumed, bears materially on the interpretation *of that which follows. The arbitrator or the jury is to settle the compensation claimed; which claim is made by one supposed to be entitled, and for which compensation, so supposed to be due, the promoters have not made satisfaction. But, if the complainant be supposed to be entitled, as the ground upon which the reference has been made to the arbitrator or the writ issued to the jury, as the proceeding before either is *coram non judice* supposing there be no title in the complainant, it would seem to follow that neither the one nor the other is competent to try that question: they are called in because the promoters have not made satisfaction (words significant in themselves) to a party entitled to compensation for damage sustained: unless he were entitled, and unless the satisfaction due had been withheld, it would seem that they ought to assume they never would have had the case before them. But for the concluding provision of the section, to which I shall draw attention presently, I should have thought little question would have been made on this: for then, whenever the promoters disputed the title of the complainant to any compensation, they would have refused to refer, or to go before a jury: the complainant would have applied to this Court for a *mandamus*, in which proceeding that previous question would have been conclusively settled. In that case, we suppose that, upon these same words, it never could have been contended that either arbitrator or jury had any jurisdiction to try whether the party was entitled. But how, in strict reasoning, can the meaning of these words be altered, because in effect the proceeding by *mandamus* is taken away, on the ground, we presume, that it was thought expensive or inconvenient, and

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another mode *of trying the same question substituted, which may be probably more expensive and more inconvenient?

The section goes on, first, providing for the alternative of arbitration; and here the promoters must go before that tribunal, unless they are willing to pay the amount claimed, and shall, within twenty-one days after notice received, enter into a written agreement for that purpose: and, secondly, providing for the other alternative thus: "if the party so entitled as aforesaid desire to have such question of compensation settled by jury," he may "give notice in writing of such his desire to the promoters," "stating such particulars as aforesaid, and unless the promoters" "be willing to pay the amount of the compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided."

Here let us stop to observe on the particulars to be stated in the notice. They are "the nature of the" claimant's "interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed." Whether "interest" or "lands" be the antecedent to the relative "which" (which may be doubtful), nothing here points to title: the "nature of the interest" is material as to the question of amount, and amount only.

Then the section proceeds: "and in default thereof" (that is, if the promoters do not issue their warrant) "they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts." The section, then, is *clear as to the consequences where the promoters will not issue the writ: the claimant can then recover nothing unless he be entitled; that question, therefore, will then come to be tried in an action, with all the advantages of a superior tribunal and a court of error; but the question of amount is closed: if the claimant establishes his title, the judgment must be for the full amount claimed. This would seem to be a penalty imposed for declining the settlement of the amount by the tribunal which the Legislature had given the claimant his option of having recourse to: and, so viewed, limiting the question before the statutory tribunal, the sheriff's jury, to the question of amount, there is nothing hard or unreasonable, or contrary to legal analogies, in the provision: nothing is more common than for mere questions of amount to

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be so disposed of both at common law and by statute: but the same cannot be said if the only alternative for the promoters was to have the question of right and title also decided by that tribunal.

In this way, however, in the case supposed, of a refusal to issue the writ, the question of right is decided. How is it to be decided if the writ be issued, and the jury are not to entertain it? The section, it will be observed, is silent as to all particulars after the issuing of the writ: and, if we refer back to the previous sections, from the 41st to the 50th inclusive, which provide for the proceedings before the same tribunal in respect of the purchase and taking of lands, it will be found that, although the verdict and judgment are made records, they are not made records of any superior Court; nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that *an action must be resorted to for recovering the amount: and, assuming that the sheriff's jury have no jurisdiction to try the title to compensation, that question will come in issue upon the trial of that action; and so the question of title will ultimately be decided in this case exactly as where the writ has not been issued at all, and with all the same advantages. I agree with Lord COTTENHAM, giving judgment in *The London and North Western Railway Company v. Smith* (1), in his remark that it is an inconvenient and unreasonable course to try the amount first and the title last. I think he points out how the Legislature came so to ordain: from the desire, namely, to prevent the having recourse to *mandamus*: but the inconvenience of this proceeding *inverso ordine* is certainly not so great as that of submitting the question to be tried by the sheriff's jury without a competent direction, and with no recourse to any court of review or writ of error.

I must now proceed to inquire, how far the decisions which have been made on this section interfere with or confirm the view to which an examination of the statute alone has led us. The point has repeatedly come indirectly before the courts of equity.

In the case I have just referred to, Lord COTTENHAM restrained a party from proceeding under the statute until he had established his right in an action at law. He did not, in terms, decide whether the jury could or could not enter on the question of right; but he clearly proceeded on the ground that their finding on it would not be conclusive: he treated them as assessing damages only, the

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right to recover which, after all, would have to be *established in an action on the judgment. When, therefore, the title was in dispute, he thought it was inequitable to enforce the legal right to the ascertainment of the damages before that had been settled, because it might be a fruitless litigation, and therefore restrained the claimant. Though he decided no more than was necessary, nothing shows that he contemplated for a moment the sheriff's jury entertaining the question of title, which, upon his argument, if they did, they could conclude nothing upon. So far, therefore, as his opinion is pronounced at all, it agrees with the view I have taken.

This point, however, came to be considered by Lord TRURO in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (1). It was not, however, necessary for the decision of the case to pronounce upon it; and the case was decided upon another point. Nor do we find that his Lordship anywhere expresses a clear opinion that the jury are competent to decide the question of right. He says, indeed, that they have repeatedly decided questions upon the construction of clauses in the Act which have arisen incidentally and indirectly before them; a power necessarily incident to the trial even of the question of amount, proving nothing as to the extent of direct jurisdiction; and he approves of the judgment of this Court in *Reg. v. Lancaster and Preston Junction Railway Company* (2), in which we upheld the finding by a jury that the claimant had sustained no damage. But we did so on the ground, not that the jury might *go beyond the question of amount, but, in the words of Lord DENMAN, because "the question, whether any damage has been sustained or not, is inseparable from the question, how much damage has been sustained," and, in the words which I then appear to have used, that, "though the inquiry may go only to the *quantum*, that *quantum* may be nothing." On the other hand, he contrasts the course he was desired by the bill to pursue with the course prescribed by the statute, which he describes thus: "going to a jury and assessing the compensation and leaving the question of his right to be afterwards decided" (3). This case was followed in order of time by that of *South Staffordshire Railway Company v. Hall* (4), in which Lord CRANWORTH, then Vice-Chancellor, dissolved an injunction upon its authority, which

(1) 87 R. R. 49 (3 Mac. & G. 155).

(2) 66 R. R. 560 (6 Q. B. 759).

(3) These words were read from 20 L. J. (N. S.) Ch. p. 223. The corre-

sponding passage is in 3 Mac. & G. 173, 87 R. R. 59; where, however, the particular expression does not occur.

(4) 89 R. R. 128 (1 Sim. N. S. 373).

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he had granted upon the authority of *The London and North Western Railway Company v. Smith* (1), considering Lord TRURO to have, in effect, overruled it, and acting of course in accordance with the last authority of the Court of Appeal. He decided nothing, but acted as Judge of an inferior Court according to the decision of the Court of Appeal. It is right, however, to state that his Lordship expresses himself, on consideration, dissatisfied with Lord COTTENHAM's decision.

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Again, and later in the same year, came on the case of *The London and North Western Railway Company v. Bradley* (2), before Lord TRURO, who acted *upon his former decision. *The Sutton Harbour Improvement Company v. Hitchens* (3), a still later case, before the Lords Justices Knight Bruce and Lord Cranworth, in December, 1851, was cited, in which a similar injunction to restrain proceedings under the statute was dissolved on appeal.

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I have gone thus carefully through the authorities cited from the Court of Chancery, because much reliance was placed on them in the argument, and from the sincere respect which is due to whatever falls from Judges so distinguished. But, in truth, they conclude nothing on the very point now to be decided. In all these cases the question was one purely of equity. Has the Company an equity which entitles it to the interference of the Court, to restrain the complainant from pursuing that legal remedy which the statute has given him? And it is now settled, contrary to the opinion of Lord COTTENHAM, that it has not. He said: The remedy was so inconvenient and oppressive, that he would compel the complainant to establish his right to it by an action at law first. The answer has now been: Be it so; the remedy may be inconvenient; but the statute has given it, under the circumstances, in lieu of the remedy by *mandamus*, which it took away: and, that being so, where it is *bonâ fide* pursued and not for dishonest and oppressive purposes, equity will not interfere to prevent a party from having recourse to it. It is true that Lord COTTENHAM expressed an opinion that the jury could not meddle with the question of title; and that aggravated the inconvenience of the remedy. But the Judges who have differed from him, one of *whom (Lord TRURO) seems to have thought that the jury may consider (not conclusively determine, be it observed) the question of title, do not decide the cases before them on this narrow ground, but on the broad ground, that the

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(1) 84 R. R. 50 (1 Mac. & G. 216).

before Lord Langdale, M. R., 13 Beav.

(2) 3 Mac. & G. 336.

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(3) 1 D. M. & G. 161. See *S. C.*,

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statutable remedy, be it more or less inconvenient, is a legal right, with which equity will not interfere, unless there be some other ground than the necessary hardship involved in its mere use.

Lord TRURO's opinion, however, on which all the subsequent cases turn, is entitled to much consideration. It is founded on two grounds: first, that the jury has always considered questions upon the construction of the section arising incidentally before them. But, with great respect, this practice, however well founded, proves but little: wherever the inquiry as to the principal matter is within the competence of any tribunal, whatever, incidentally arising, bears upon that, must, *ex necessitate*, for the purposes of that inquiry, be within its competence also. It is in this way that courts of common law occasionally deal with questions of ecclesiastical or maritime law, and *vice versa*. In this way Judges at Nisi Prius sometimes dispose of questions of fact: and instances of the same kind might be multiplied indefinitely. When, therefore, in order to determine the amount, it is necessary to settle whether this or that statement of a claim shows it to be of a kind which is within the section (and this was the sort of question which occurred in several of the equity cases), the jury must, as well as they can, with such help as they have from the sheriff or his assessor, decide the point: for, unless they did so, they could not ascertain the amount of compensation. Lord TRURO's second ground is: that the point has clearly been decided by the courts of law: *and this, therefore, will bring us to the examination of the cases relied on by him, and in the argument before us, which is the only remaining topic of inquiry.

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The first of these cases, *Reg. v. The Eastern Counties Railway Company* (1), was a case upon the return to a *mandamus*, arising and decided long before the passing of the statute we are now construing; and, according to the reports of it in 2 Q. B. and 11 Law Journal (2), some points which are noticed by Lord TRURO as having arisen in it do not seem to have arisen: certainly they are not noticed in the written judgments: if so, it had no bearing whatever on the present question. The same may be said of *Rex v. The Directors of the Bristol Dock Company* (3). *Corrigal v. The London and Blackwall Railway Company* (4) was upon a local Act prior to the passing of stat. 8 & 9 Vict. c. 18: and it was an action upon the sheriff's

(1) 57 R. R. 689 (2 Q. B. 347).

(3) 11 R. R. 440 (12 East, 429).

(2) 57 R. R. 689 (11 L. J. (N. S.)

(4) 5 Man. & G. 219.

Q. B. 66).

judgment after a verdict by the compensation jury: and, so far as it has any bearing on the present case, the question arose on the fourth plea, in which, by way of invalidating the inquisition, it was alleged that evidence was given before the jury, not only of the loss in respect of goodwill, tenant's fixtures and otherwise, by the taking of the dwelling-house, but also of loss sustained in respect of the dwelling-house by reason of the construction of the railway; whence it was inferred, in argument, that the sum assessed by the jury was composed of damages given in respect of both those grounds of injury. The Court, however, thought that the mere fact of the evidence having been given could not affect the validity of the verdict; "for," say they, "such evidence may have been given to show that the house had *been deteriorated, which was necessary to give the jurisdiction to the sheriff and jury:" and, as to the inference of fact, they held that it was excluded by the language of the verdict itself. The words which we have cited from the judgment are the only words which bear on the present question. The Act (1) empowered the jury "to inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase," "and also the sum of money to be paid by way of satisfaction" &c. "for goodwill, improvements, tenant's fixtures, or for any injury or damage whatsoever." The claim was under both heads: but, as the right to insist on either was founded on the house having been deteriorated in the course of constructing the railway, it may be inferred, from the words cited, that the Court thought it a relevant subject of inquiry by the compensation jury, in order to the founding of their own jurisdiction. To this extent it is adverse to our construction of the statute before us: but it is a remark not founded on any previous argument, but on an assumption; it was used to meet an objection of a totally different kind from that we have been considering: and it was quite unnecessary to make it; for the language of the verdict showed that the evidence, whether properly or improperly admitted, had not been allowed to enter into the calculation of the damages. *Williams v. Jones* (2) is upon another point; and *Reg. v. Lancaster and Preston Railway Company* (3) we have already noticed incidentally. All that any member of this Court there said was upon the *power of

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(1) 6 & 7 Will. IV. c. cxxiii., local and personal, public: "For making a railway from the Minories to Blackwall, with branches, to be called 'the

Commercial Railway.'" See s. 22, in note to 5 Man. & G. 231.

(2) 67 R. R. 767 (13 M. & W. 628).

(3) 66 R. R. 560 (6 Q. B. 759).

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the jury to consider any question which affected the *quantum* of damages.

These are all the decisions at law to which Lord TRURO's judgment refers. But, in the argument against the rule, the case of *Reg. v. Metropolitan Commissioners of Sewers* (1) was referred to: but that case, so far as it is relevant, supports the rule: it was decided, however, on the special words of the Act there under consideration, which, in terms, limited the functions of the jury to questions upon amount only (2).

On the other hand, *Chabot v. Lord Morpeth* (3) was referred to, which, although not on the same statute, nor precisely in point, contains observations from the Bench which favour the argument of the present complainant.

The result of the whole examination appears to be, that the question now to be determined has never yet received direct and considered decision.

As before intimated, we think that the words of the section, as well as the justice and convenience of the case, are against the course taken upon this inquisition. It is admitted that the sheriff's jury cannot conclusively determine the question of title: that in itself is an argument against their entering upon it at all, on the ground of delay and expense. It must be admitted, also, that, even for a preliminary and inconclusive trial, they are an unsatisfactory tribunal, and their decision additionally objectionable, because no error in the direction given to them, nor any mistake, or even perverseness, in their finding can be reviewed, as in a trial *at Nisi Prius. Experience, moreover, shows that an inconclusive preliminary inquiry is very often not merely useless, but has a tendency to interfere injuriously with the conduct and result of the second and conclusive inquiry. The question once examined and found upon does not come before the jury on the second trial perfectly free from prejudice.

Upon all these grounds I think the rule to remove the inquisition should be made absolute.

Lord CAMPBELL, who has read this judgment, desires me to express his concurrence; and he states that he takes the same view as I have done of the case of *Reg. v. Lancaster and Preston Railway Company* (4).

(1) 1 EL. & BL. 694.

Great Northern Railway Company, 80

(2) It was suggested, in argument, that the power of the jury to inquire into title was assumed in *Reg. v.*

R. R. 203 (14 Q. B. 25).

(3) 81 R. R. 680 (15 Q. B. 446).

(4) 66 R. R. 560 (6 Q. B. 759).

My brother WIGHTMAN also concurs in this judgment.

Rule absolute.

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The inquisition, verdict and judgment having been returned (1), *Hugh Hill*, in Easter Term 1854, obtained a rule calling on the Company to show cause why they should not be quashed: and, in the same Term (May 6th, before Lord Campbell, Ch. J., Wightman and Crompton, JJ.), *Sir F. Kelly* appeared on behalf of the Company, and *Hugh Hill* in support of the rule, which was made absolute without discussion.

REG. v. JUSTICES OF WORCESTERSHIRE (2).

(3 EL. & BL. 477—490; S. C. 23 L. J. M. C. 113; 18 Jur. 424; 22 L. T. O. S. 332.)

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Two justices made a certificate, under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), for the diversion of a highway. The certificate stated that the justices had on the application of the surveyor of the highways viewed the highway proposed to be diverted &c., but did not show that the surveyors were authorized to make the application. On appeal, by a party interested, the Sessions held the certificate bad on this ground, and refused to proceed further.

A rule *nisi* having been obtained for a *mandamus* to enter continuances and hear the appeal:

Held, that the appellate jurisdiction, given to the Sessions by the Highway Act, 1835, was not limited to the points mentioned in sect. 89, but was general; and that consequently the Sessions had jurisdiction to entertain the question whether the certificate was good or bad; but that, having exercised their jurisdiction, *mandamus* did not lie, even if they were wrong.

Held, also, that the certificate was defective, as not showing that the preliminaries necessary to give the two justices jurisdiction to certify had been complied with.

HUGH HILL, in last Michaelmas Term, obtained a rule *nisi* for a *mandamus* to the justices of Worcestershire, commanding them to enter continuances in the matter of the enrolment of a certificate, under the hands of two justices in and for Worcester, that they had viewed a highway proposed to be diverted, and to hear an appeal against the same.

The affidavits set out as an exhibit the certificate of the two

(1) The warrant, also, was returned. But *Hugh Hill*, in Trinity Term, 1854 (7th June), moved that the warrant should be taken off the files of the Court, and remitted to the Sheriff of Warwickshire, on an affidavit stating that the claimants had required the sheriff to execute the warrant by summoning a jury, and that the sheriff

had answered that he had returned the warrant with the inquisition &c. The COURT (LORD CAMPBELL, Ch. J., ERLE and CROMPTON, JJ.) made the order as prayed for.

(2) *Reg. v. Maule* (1871) 41 L. J. M. C. 47, 23 L. T. 859. *Dicta* disapproved in *Reg. v. Harvey* (1874) L. R. 10 Q. B. 46, 44 L. J. M. C. 1, 31 L. T. 505.

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justices. It commenced by reciting that, on the application of the surveyors of the highways in the township of Upper Swinford in the parish of Old Swinford, they had viewed certain highways for foot passengers, described in the certificate, and also a proposed new highway, which Richard Hickman was desirous should be established in lieu of part of the highways, before described, in a manner described in the certificate; and, after stating, in substance, a compliance with the directions contained in stat. 5 & 6 Will. IV. c. 50, s. 85, the two justices certified that they had viewed the proposed diversion, and that the proposed highway was more commodious for the public than the existing one. The certificate was

[*478] lodged with the clerk of the peace. *Notice of appeal to the Quarter Sessions was given, by a person who considered himself aggrieved: in the notice of appeal were eight grounds of appeal. Several of these were on the merits: but the Sessions decided only on the first; which was: "That the said certificate is defective and bad upon the face thereof, because it omits to state that the surveyors, at whose request it is alleged the said justices viewed the highways sought to be diverted, had first duly obtained the consent of the inhabitants of the said parish, in vestry assembled, to the proposed diverting of the said highways, after a notice in writing, from the party desirous of diverting the same, requiring the said surveyors to convene a meeting for the purpose of obtaining such consent, or that the said surveyors were at the time of their said request to view in possession of, and acting under, an order in writing of the chairman of a meeting of the said inhabitants in vestry assembled." When the appeal came on before the Quarter Sessions this objection was taken, and argued; and the Quarter Sessions, being of opinion that the certificate was insufficient, refused to hear the case further, or to enter on its merits.

Selfe and H. J. Hodgson, in last Hilary Term, showed cause (1):

This being a rule for a *mandamus*, it is immaterial whether the Sessions have decided rightly or wrongly, if they have in fact exercised their jurisdiction: *Reg. v. Blanshard* (2).

(LORD CAMPBELL, Ch. J.: If, supposing a peremptory *mandamus* awarded, the justices *would be required, in obedience

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(1) January 26th. Before Lord and Erle, JJ.
Campbell, Ch. J., Coleridge, Wightman (2) 78 R. R. 381 (13 Q. B. 318).

Term (1) we refused a rule *nisi* in the nature of a *mandamus*, because it was, in effect, to order the justices to adjudicate in a particular way.)

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The cases are uniform to the effect that, if the decision is wrong, there may be a remedy by appeal or by writ of error, but that the remedy by *mandamus* is applicable only where there has been a declining to exercise jurisdiction.

(LORD CAMPBELL, Ch. J.: Do you go so far as to say that any *bonâ fide* decision on the form of the certificate must be an exercising of jurisdiction? Suppose, to test the principle, that the Sessions had decided that the certificate was bad because the letters "i" were not dotted, or on some such frivolous objection.)

It may be a necessary qualification, that the ground of decision be one which may reasonably be entertained. Perhaps, in an extreme case, it would be held that such a decision as that suggested could not be a judicial decision. In the present case the decision was right. Wherever an authority is limited, the proceedings must show on the face of them that the act done was within the *authority: *Christie v. Unwin* (2). Here the authority is given by stat. 5 & 6 Will. IV. c. 50, sects. 84 to 92. [He then cited the provisions of these sections and proceeded:] The first step in the whole of this machinery is to have a parish meeting, and an order from the chairman of that meeting to the surveyor. And there is good reason for this, as the parish will be liable, under sect. 92, to the repair of the new highway; and it may well be that the new highway may be nearer and more commodious for the public, and yet the repairs of the new highway be so much more costly than those of the old one that the interests of the parish require that the

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(1) Wednesday, January 11th, 1854.
Reg. v. Justices of Bristol.

Sir A. J. E. Cockburn, Attorney-General, moved for a rule, in lieu of a *mandamus*, under stat. 11 & 12 Vict. c. 44, calling on the justices of Bristol to show cause why they should not commit and punish a person of the name of King. The justices had refused to convict him, under the erroneous impression that the Act under which the information was laid had been repealed.

11 & 12 Vict. c. 44, s. 5, substituted a rule for a *mandamus*, but gave no jurisdiction to this Court to interfere where they could not do so by *mandamus*. However erroneous the decision may have been, the justices have heard and determined the matter; and we have no power to interfere.)

Per CURIAM (LORD CAMPBELL, Ch. J., COLERIDGE, WIGHTMAN and CROMPTON, JJ.):

Rule refused.

(2) 11 Ad. & El. 373.

(LORD CAMPBELL, Ch. J.: Stat.

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deviation should not take place. The provision requiring that the vestry should originate the proceedings before a highway shall be diverted seems inserted for the same reason as the proviso, in sect. 23, requiring that the vestry shall be consulted before a new highway is dedicated to the public so as to cast the burthen of repairing it on the parish.

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Hugh Hill, Huddleston and J. J. Powell in support of the rule:

The decision was on a matter which formed no part of the legal merits. In *Reg. v. Stacey* ⁽¹⁾, where the Sessions had erroneously, on a technical objection, annulled a certificate of the barrister appointed to certify the rules of Friendly Societies, the order of Sessions was removed into this Court by *certiorari*, and a rule to quash it discharged: but PATTESON, J. said: "In substance the Sessions treated the matter as a mere nullity, and therefore did not go into the merits of the appeal. The respondents should have applied for a *mandamus* to hear the appeal."

(LORD CAMPBELL, Ch. J.: I have great respect for the opinion of that learned Judge: but, if he did say that a *mandamus* would lie in that case, I cannot agree with him. But I doubt whether he did say it; for in the report of the same case in the Queen's Bench Reports no such *dictum* appears ⁽²⁾.)

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The Sessions have no jurisdiction in such an appeal as this, to inquire into the form of the certificate. Their duties are defined by sect. 89, which * * limits the jurisdiction on appeal to an inquiry into the points therein mentioned, and no others.

(COLERIDGE, J.: If the vestry had ordered the surveyor not to go on, and he notwithstanding did go on, there must surely be some mode of stopping him.)

Probably; but not by appeal, which is not of common right, but only the creature of the Act. Perhaps the remedy would be by quashing the order as made without jurisdiction. The proceedings of the two justices are regulated by sect. 85. They are to act when requested by the surveyor; but they have no power to inquire

(1) 80 R. R. 401 (19 L. J. (N. S.) M. C. 177; S. C. 14 Q. B. 789).

(2) According to the note made at the time for the Queen's Bench Reports, the learned Judge does not appear to have expressed any opinion that a

mandamus would lie, but to have suggested to the counsel: "if, as you say, the Sessions have not heard the appeal, you should have applied for a *mandamus*, not for a *certiorari*."

*whether he has been duly authorized; and the certificate need not show anything on the face of it into which the justices could not inquire: *Taylor v. Clemson* (1).

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(LORD CAMPBELL, Ch. J.: It is impossible to contend that the objection is so clearly wrong and frivolous that we should say it could not be the subject of judicial decision. The case is therefore reduced to the question, Whether the Sessions have jurisdiction to inquire into the validity of the certificate, or their appellate jurisdiction is limited: which is a question of difficulty and importance.)

Cur. adv. vult.

COLERIDGE, J., in this vacation (February 18), delivered judgment:

This was a rule for a *mandamus* to the justices of the peace for the county of Worcester to hear and determine an appeal against the enrolment by them of a certificate by two justices of the peace, for the diversion of a highway and the stopping up of the old road. Upon cause shown, it appeared that the appeal had been called on, and the appellants had proceeded to point out objections apparent on the face of the certificate. The Court had entertained these objections, heard arguments on both sides, decided in favour of the appellants on one, and refused thereupon to proceed any further towards the enrolment. We had no doubt, upon the argument, that the decision of the Court upon this objection was correct, and that the point on which it arose was a substantial one, disposing of the appeal on its legal merits. Nor was this matter in the end very seriously *contested: but it was very strongly urged that, since the passing of stat. 5 & 6 Will. IV. c. 50 (the General Highway Act), the Sessions had no jurisdiction to inquire into defects on the face of the certificate; that the certificate was merely an instrument by which the question upon the merits in point of fact was brought before the Court; and that, when so brought, the certificate had done its work: that then the jurisdiction of the Quarter Sessions was original, and not appellate, and limited to the trying by a jury of the three questions stated in the 89th section of the Act. We have considered this matter, and are of opinion that there is no foundation for the argument.

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The provisions now in force for the stopping up, diverting or

(1) 65 B. R. 273 (11 Cl. & Fin. 610), 57 B. R. 862 (2 Q. B. 978). See also affirming the judgment of the Exchequer Chamber in *Taylor v. Clemson*, *Ostler v. Cooke*, 78 B. R. 323 (13 Q. B. 143).

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turning highways are contained in the 84th and seven following sections. After the two viewing justices have been properly set in motion, and after they have given the notices, had the view, and satisfied themselves upon certain points stated in the 85th section, they are, by that section, required to make a certificate; and the Legislature has minutely and anxiously specified, in that section, what particulars that certificate is to contain, what facts it is to state, what conclusions of the justices, and the reasons for them, and with what proof of preliminary notices and what plan it is to be accompanied. This certificate is to be lodged with the clerk of the peace for inspection during a limited period, and, after certain preliminaries, is to be ultimately enrolled.

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In its form, this instrument at this stage purports to be a certificate rather than an order: yet in the following section, and before the Sessions have done any act in regard to it, it is called "order or certificate;" and, in *the following sections, these terms seemed to be used indifferently in speaking of it; and this may have grown out of its somewhat anomalous character: it is an order in the sense of its being the subject of an appeal; unless appealed against by any one who thinks that he should be aggrieved, if what it recommends, rather than orders, to be done should be carried into effect, that recommendation will be carried into effect by a substantive order of Sessions; it is no order in terms if not appealed against; but it will be made the strict foundation of a subsequent order. This distinction, however, of terms is immaterial; for it is clear that an appeal is given against it whatever it may be. Sect. 87 speaks of what the Court may do in the way of partial or entire confirmation, "in the event of any appeal being brought against the whole or any part or parts" of it. Sect. 88 expressly gives an appeal. Sect. 90 provides for the costs of the appeal. Sect. 91 directs what shall be done in case there be no appeal; and sect. 89, the consideration of which we have purposely reserved, introduces for the first time certain new provisions in case of appeal. It is idle therefore to talk of the jurisdiction of Sessions not being appellate: the only question can be, What are the limits of the appellate jurisdiction?

This turns upon two points. First, it is said that the words of sect. 89 limit the action of the justices at Sessions to the trying certain questions by a jury; second, that no inference can be allowed, even if these words are not in themselves exclusive, to raise an appellate power beyond them. The words are these: "in

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case of such appeal the justices at the said Quarter Sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to *the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury." The jury so impanelled is to find upon these questions of fact; and, according to their finding, the justices as to allow or disallow the appeal. These words it is clear are not in terms exclusive; nor do they embrace all the supposable cases in which serious objections may exist to the confirmation of the certificate; in terms the Legislature does not say, Let a jury be impanelled to determine the appeal; but, Let it be impanelled to determine certain questions of fact: those were questions which, under the previous Highway Acts, the justices themselves, as judges both of law and fact, were accustomed to determine; and, in a great majority of cases, upon these questions the fate of the appeal will depend; and these questions will be the last that will come into discussion; the trial of them supposes all other questions decided in favour of the certificate; for both reasons the section goes on to say that, according to the finding on these, the judgment of the Sessions shall be. The words then not being in terms exclusive, nor in themselves embracing, as we shall presently see, all the matters upon which questions may arise fit to be settled, before the certificate be confirmed, the second question arises upon the inference as to the extent of the appellate jurisdiction. It is undoubtedly true that appeals from the orders of an inferior statutory jurisdiction do not arise except by statutory provision, and, if not created by express affirmative language, can only arise by an inference absolutely necessary, and where language is used which is tantamount to express enactment: but, *where an appeal is clearly given from an order involving questions of law and fact to a Court competent to decide both questions, and there are no words which restrain the appellate jurisdiction, we are not aware of any principle of law, or any decision, which prevents the party aggrieved from having his remedy by appeal, where the grievance is matter of law, more than where it is matter of fact. It is obvious that, even if such order were removable into this Court by *certiorari*, it would be very inconvenient that a party having two grounds of complaint should be driven to seek his remedy in two Courts, when one might administer both; and when, as here by sect. 107, the *certiorari* is taken away, the principle

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contended for, if it prevailed, would deprive him of all remedy for what might yet be a very serious grievance. Stat. 55 Geo. III. c. 68, which gave and regulated the appeal before stat. 5 & 6 Will. IV. c. 50, passed, used the most general terms (1); it authorized any person aggrieved "to make his complaint by appeal;" and, this appeal being to a Court which was judge of law and fact, it was always considered that it was an appeal to its whole jurisdiction. Such indeed must be the meaning of any general appeal; whatever the Court is competent to consider, the party aggrieved may present to it for consideration. Here an appeal is certainly given. The words of sect. 89, on which reliance was placed, we have expressed our opinion not to be exclusive; and therefore the conclusion would follow that the powers of the court of appeal extend to the whole matter alleged by way of grievance.

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There remains, however, to be mentioned a part of the *entire subject which was not brought before us upon the argument, but which appears to us to be conclusive as to the proper construction of the statute. The certificate, as we have before stated, must contain certain statements, and be accompanied with a plan of a certain kind, and proof of certain facts: in the case of *Reg. v. The Newmarket Railway Company* (2) we pointed out the important purposes which the Legislature intended to secure by this provision. This certificate, when lodged with the clerk of the peace in order to inspection and subsequent enrolment, may be either appealed against or not. If the latter, sect. 91 of the statute comes into operation, and the justices at Sessions must make their order for diverting or stopping up as the case may be. But they can have no other materials on which to frame their order than the certificate. What are they to do if, upon the face of it, it be so defective as to give them no certain information? What, if the plan does not contain the requisite measurements? What, if the proof does not show proper notices given? If they still make an order upon it, as it is, they must proceed by guess work, without being sure that they are doing what the justices certified as proper to be done, or that the parties interested have had the proper notice. If they hear evidence, and seek to supply the defect, they cannot still be sure whether they are carrying into effect the thing originally intended to be certified, or some other thing by which some party interested may be aggrieved, and against which, if he had had the statutory opportunity, he would have appealed. These

(1) Sect. 3.

(2) 81 R. R. 762 (15 Q. B. 702).

consequences are so serious, that we *conclude that it is the duty of the Sessions, where there is no appeal, to be satisfied that the certificate comes before them correct on its face, and accompanied by plan and proof, such as the statute requires. Unless this be done, neither the public, nor interested individuals, will have the protection which the statute intended.

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But, if this be the duty of the justices at Sessions and within their competence, when there is no appeal, how can it be maintained that, when there is an appeal, it is less a part of their duty, and not within their competence, to decide upon the very same questions if presented to them by the appellant. It must be trusted to the Court to determine what apparent defects are merely formal and no grievance, and what are substantial; but, assuming the certificate to be substantially defective, it seems to us that all the reasons apply why the Court should refuse to confirm it on appeal, as would prevent it from making an order on it where there is none. The certificate must be supposed to contain the mind of the two viewing justices, who have framed it; if it omits to state any substantial matter, on which the statute requires them to express a judgment, the Quarter Sessions, whose whole jurisdiction depends on the certificate, cannot know that they have ever considered it, or, if they have, that in the order which they shall make they will be carrying out what it was intended to recommend.

We are of opinion therefore that the Quarter Sessions have in the present case exercised a lawful power, and exercised it properly; and that the rule ought to be discharged.

Rule discharged.

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(3 EL. & BL. 491—516; S. C. 7 Rail. Cas. 877; 2 C. L. R. 633; 23 L. J. M. C. 84; 18 Jur. 673; 22 L. T. O. S. 330.)

The undertaking of the R. Railway Company was, under an Act of Parliament, let to the S. E. Company at an agreed rent for 1,000 years; and the S. E. Company entered and occupied the line under the lease. By a subsequent Act, the two Companies were amalgamated; and, in lieu of the rent formerly paid to the R. Company, the shareholders became entitled to annuities, equivalent in amount to the rent, chargeable on the funds of the amalgamated Company, of which the R. line now became a branch.

Two rates were made by the overseers of the parish of D. on the S. E.

(1) *Reg. v. L. and N. W. Rail. Co.* K. B. 717, 76 L. J. K. B. 577, 96 L. T. (1874) L. R. 9 Q. B. 134; *Great Central Rail. Co. v. Banbury Union* [1907] 1 243.

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Company as occupiers of a portion of the R. line which passed through that parish. One was made during the time that the R. line was the property of a separate Company, but occupied by the S. E. Company as tenants under the lease. The other was made after the amalgamation. Notice of appeal was given against each ; and a case was stated for the opinion of this Court. The first question for the Court was, in substance, Whether the rent, during the period when the line was on lease, and the amount of the annuities paid for the line after the amalgamation, were the proper criterion of the rateable value of the branch line :

Held, by the whole COURT, that they were not the criterion of the rateable value, which depended upon the present annual value of the property occupied, and might be more or less than the sum which the parties had agreed to give for it.

The case stated that traffic was brought by the R. line on the main line of the S. E. Company, and profit was thus obtained by the S. E. Company from the R. line, as a feeder to the main line of the Company : and it was found, as a fact, that, if the R. line was in the market, it would be an object of competition between the S. E. line and rival Companies, and the rent would, in fact, be enhanced by such competition. The second and third questions for the Court were, in substance, Whether these matters should be taken into account in estimating the rateable value of the part of the R. line within the parish of D., or whether the rateable value should be calculated solely on the profits of the line itself. On this :

Held, by Lord CAMPBELL, Ch. J., COLERIDGE, J. and CROMPTON, J., that both these matters were to be taken into account, inasmuch as, though lying out of the parish of D., they enhanced the value of the occupation of the portion of the line in D., and, though there might be much difficulty in calculating the result, the Sessions were to find it as nearly as they could.

ERLE, J. dissenting, and holding that the enhanced earnings on the parts of the line of the S. E. Company out of the parish of D. were to be rated in the parishes where these parts were situate, and not in the parish of D., and that the only question was, what was the rent which would now be given for the occupation of the part of the line in D.

NOTICES having been given of appeal against two several rates for the relief of the poor of the parish of Dorking, a case was, by order of a Judge and consent, stated for the opinion of this Court. The material parts of the case were as follows.

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“ The South Eastern Railway Company was established and incorporated under that name by stat. 6 & 7 Will. IV. c. lxxv. (1).

“ The Reading, Guildford and Reigate Railway Company were incorporated under that title by the Reading, Guildford and Reigate Railway Act, 1846 (9 & 10 Vict. c. clxxi. (2)), and were thereby authorized to make a railway from the Great Western Railway at or near the Reading station of such railway in Berkshire, to join the South Eastern Railway in the parish of Reigate in Surrey.

(1) Local and personal, public: Railway.”

“ For making a railway from the London and Croydon Railway to Dover, to be called the South Eastern

(2) Local and personal, public: “ For making a railway from Reading to Guildford and Reigate.”

The same statute enacts that it shall be lawful for the Reading, Guildford and Reigate Railway Company to demise or lease the Reading, Guildford and Reigate Railway to the South Eastern Railway Company for such term, and upon such conditions, as shall be or shall have been agreed upon between the said Companies, and to carry into effect any arrangement, not inconsistent with any of the provisions thereinbefore contained, that shall be or shall have been agreed upon between the said Companies, subject to the provision next hereinafter contained, which is to the effect that the Reading, Guildford and Reigate Company should proceed with the construction of the entire line from Reading to Reigate, so that the same should be completed within the time limited by the Act, and that it should not be lawful for them to enter into any agreement with the South Eastern Railway Company for the abandonment of any portion thereof.

“By articles of agreement, under the respective common *seals of the said Companies, made 11th May, 1847, it was agreed between the said Companies that the Reading, Guildford and Reigate Railway Company should grant to the South Eastern Railway Company a lease at a rent equal to 5*l.* 10*s.* per cent. per annum on the capital raised and to be raised by the Reading, Guildford and Reigate Railway Company, not exceeding 600,000*l.*, without any participation in profits by the said last mentioned Company; by way of commutation” for 4*l.* 10*s.* per cent., and half profits as previously agreed for; “and that the portion of the line between Dorking and Reigate should be included in the said lease; and also that, when the Reading, Guildford and Reigate Railway Company should have made the said Reading, Guildford and Reigate line, they should grant, and the South Eastern Railway Company should accept, a lease thereof for 1,000 years on the terms in such agreement mentioned.

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“The Reading, Guildford and Reigate line was completed, and opened for traffic throughout, from Reigate to Reading, before 15th March, 1850, on which day a lease was granted by the Reading, Guildford and Reigate Railway Company to the South Eastern Railway Company, for the term of 1,000 years, at the yearly rent of 33,000*l.* clear of all rates and charges except income tax. The lease also provided that the South Eastern Railway Company should pay interest, not exceeding 4*l.* per cent. per annum, on a bond debt of 200,000*l.* incurred in making the Reading, Guildford and Reigate line, which interest amounts to the sum of 8,000*l.* a year. The South Eastern Railway Company are bound by the

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lease to keep the line in repair. When the lease was granted the South Eastern Railway Company were *bound by the agreement of 11th May, 1847, to take the lease."

"The Reading, Guildford and Reigate Railway mentioned in the said lease forms a junction with the South Eastern Railway at Redhill in the parish of Reigate in the county of Surrey, and runs thence to Reading in the county of Berks; but it does not form a junction with the Great Western Railway.

"The Reading, Guildford and Reigate line is worked by the South Eastern Railway Company, in connection with the main line from London to Dover, and the branches connected therewith; and the South Eastern Railway Company are the sole occupiers of the whole of the said lines, on which they carry on, exclusively, a business as carriers of passengers and goods.

"There are 46 miles of railway between the junction at Redhill and Reading, but only 40 miles of this railway are demised by the lease; 6 miles of the line between Guildford and Ash belonging to the South Western Company, to the use of which the South Eastern Railway Company are entitled on payment of toll, pursuant to an agreement of the Reading, Guildford and Reigate Company and the South Western Railway Company.

"The Reading, Guildford and Reigate line, leased to the South Eastern Railway Company, passed, for a length of 341 chains, through the parish of Dorking in the county of Surrey.

"By a rate for the relief of the poor of the said parish of Dorking made on the 6th day of December, 1849, the South Eastern Railway Company were assessed, as occupiers of the portion of the said railway in Dorking parish, at a rateable value 2,228*l.* 2*s.* 6*d.*; and the rate *demanded of the South Eastern Railway Company on that assessment amounts to 222*l.* 16*s.* 3*d.* For the purposes of this case, the said rate is to be taken as made after the date of the said lease, the South Eastern Railway Company not disputing that they were equally liable at the time of the making of the said rate, as if the said lease had been then made."

The case then showed that notice of appeal against this rate was given by the South Eastern Railway Company, and proceeded:

"The respondents had in and by the hereinbefore mentioned rate assessed the South Eastern Railway Company in respect of the said portion of their railway in the parish of Dorking, upon a valuation founded upon the said rent of 41,000*l.*, paid by the said Company, under the said lease, for the Reading, Guildford and Reigate line:

and, if the said rent is the proper criterion of the rateable value, then the said assessment of 222*l.* 16*s.* 3*d.* is correct.

“ The gross earnings of the South Eastern Railway Company on the Reading, Guildford and Reigate line, less the proper deductions, did not, in the year for which the rate was made, amount to 41,000*l.* less the statutory deductions under the Parochial Assessment Act. The Reading, Guildford and Reigate line brought a great deal of additional traffic to the main line of the South Eastern Railway Company: and the latter Company thus derived benefit from the Reading, Guildford and Reigate line, as a feeder to the main line, in respect of traffic conveyed upon that line. The Reading, Guildford and Reigate line, if in the market, might be an object of competition in consequence of the spirit of rivalry existing between the South Eastern Railway Company and other Railway Companies, the traffic on the main lines of which would *be increased by the possession and controul of the Reading, Guildford and Reigate line.

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“ By ‘ The South Eastern and Reading, Guildford and Reigate Railways Amalgamation Act, 1852 ’ (15 & 16 Vict. c. ciii. (1)), it was, in sect. 3, enacted that, ‘ from and after the passing of this Act the Reading Company shall be dissolved, and subject to the powers and provisions of this Act, all the undertaking, estates, property, and effects whatsoever of that Company, already demised to the South Eastern Company, and all the capital, and all other the property and effects, and all the estates, rights and interests, powers, authorities, and privileges, both at law and in equity, and otherwise howsoever, of the Reading Company, shall respectively remain and be transferred to and vested in the South Eastern Company absolutely and for ever, and shall be deemed part of the original undertaking of that Company.’

“ And, by sect. 27 of the same Act, ‘ from and after the passing of this Act the whole of the undertaking of the South Eastern Company shall be charged with the payment of the shareholders in the Reading Company, their successors, executors, administrators, and assigns, of 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each (making the aggregate perpetual annuity of 41,000*l.*) by way of commutation for the yearly rent and other yearly sums payable under the recited

(1) Local and personal, public: the South Eastern Railway Company; “ For merging the undertaking of the Reading, Guildford, and Reigate Railway Company in the undertaking of the South Eastern Railway Company; for the dissolution of the Reading, Guildford, and Reigate Railway Company, and for other purposes.”

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lease by the South Eastern Company to or for the benefit of the Reading Company.'

"By another rate for the relief of the poor of the said parish of Dorking, after the passing of the said last mentioned *Act, on 12th November, 1852, the South Eastern Railway Company are assessed as occupiers of the said railway in Dorking parish at a rateable value of 5,040*l.* 10*s.*; and the rate claimed of the South Eastern Railway Company on that assessment amounts to 420*l.* 0*s.* 10*d.*"

The South Eastern Railway Company duly appealed against the last mentioned rate.

"The whole of the facts and circumstances, previously stated as to the first mentioned rate, are applicable to the case of the last mentioned rate, with the exception of the lease, which is applicable only to the said first mentioned rate, and the said last mentioned Act of Parliament is applicable only to the last mentioned rate.

"The questions for the opinion of the Court are :

"First. Whether the appellants are properly assessed in the said rate of the 6th of December, 1849, at the sum of 222*l.* 16*s.* 3*d.* and in the said rate of the 12th of November, 1852, at the sum of 420*l.* 0*s.* 10*d.*

"Second. Whether the appellants are liable to be assessed in respect only of the net profit derived from the traffic passing through Dorking, irrespective of any rent paid by the Company and the value of the Reading, Guildford and Reigate line as increasing the traffic on the main line.

"Third. Whether the respondents are entitled to take into consideration, in their assessment, the value of the line to the appellants as an integral part of the South Eastern Railway, in addition to the net profit as derived from the traffic passing through the parish of Dorking.

"If the Court should be of opinion that the rent under the lease is the proper criterion of the rateable value as regards the first mentioned assessment, made during the *existence of the lease, then the assessment is to be confirmed.

"If the Court should be of a different opinion, then the matter is to go back to the Quarter Sessions, or an arbitrator to be appointed by counsel on both sides, to determine the proper amount of assessment in conformity with the opinion of the Court upon the 2nd and 3rd questions; and the rate is to be amended accordingly.

"If the Court should be of opinion that, as regards the last mentioned assessment, either the rent reserved under the said lease

(notwithstanding such rent had ceased before the making of such last mentioned assessment) or the annuity payable under the said last mentioned Act of Parliament is the proper criterion of the rateable value, then the same is to stand confirmed.

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If the Court should be of a different opinion, then the same course is to be taken as with respect to the first rate."

The case was argued in last Trinity Term, by *Pashley* for the respondents, and *Willes* for the appellants. The arguments and authorities are so fully considered in the judgments as render any further report unnecessary.

Cur. adv. vult.

In this vacation (February 18th), there being a difference of opinion on the Bench, the Judges delivered separate judgments.

CROMPTON, J. :

The first question is : Whether the two assessments in question are proper : and it is stated that *they are to be regarded as proper, and are to be confirmed, if the rent as to the first rate, or the rent or annuity as to the second, is the proper criterion of the rateable value.

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I understand by the question, as explained by this statement, that we are to say, whether, in our judgment, these assessments were properly made by taking the rent, before the statute of amalgamation, or the rent or annuity, after that Act, as the sole criterion from which the assessment is to be made: and I am of opinion that it can by no means be so considered.

Even as to the first rate, where the smaller line has not become a portion of the other, the rent can only be taken as matter of evidence of the rateable value, or of the rent at which it might be expected to be let, under the Parochial Assessment Act; and all the circumstances under which that rent may at first have been given, or which may have subsequently affected the value of the portion of the line, must be taken into account, so as to see what would be the rent that might be expected to be got from it at the time when the assessment is made. Under neither of the rates can the rent or annuity be taken to be the sole criterion from which the assessable value can be arithmetically deduced.

I therefore answer the first question, as explained by the subsequent matter, by saying that, in my opinion, these assessments are not to be confirmed.

Secondly : I think that, in strictness, the value of the branch, as a feeder, is to be taken into account in ascertaining the rateable

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value. It is profit derived from the occupation of the land ; and it seems to me impossible to say that the value to the persons willing to take the line, or the rent likely to be got from them, *would not be increased by the advantage of this line to, and from its being a feeder of, the larger railway. The value of the land in the parish is increased and enhanced by its being useful as increasing the profit that may be made in another place : and I think that the rateable value within the parish may clearly be enhanced by matters in another parish.

It is true that in the mode of taking the account of the earnings in the parish and of the deductions to be made, according to the mode mentioned in the recent cases of *Reg. v. Great Western Railway Company* (1), no item is mentioned for the value in respect of being a feeder to the main line : and it may be difficult, and often not worth while, to introduce this new element into the account : but, on principle, the rateable value, according to the rule in the Parochial Assessment Act, seems to me affected by the value of the line in the particular parish as a feeder of the main line. I answer the second question, therefore, in the negative.

And, as I suppose that the third question refers to the value of the branch line as a feeder, no other peculiar value than as a feeder being suggested, the third question seems in effect another way of putting the second ; and I answer it in the affirmative : that the respondents are entitled, in making their assessment, to take into consideration the value as a feeder to the main line.

ERLE, J. :

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In this case I consider the material facts to be, that one rate was made while the Reading and Reigate Railway was under lease, and the other after it was amalgamated with the South Eastern Railway : and the material questions to be : What is the principle for *ascertaining the rateable value of the portion of the line in the parish of Dorking for each rate ; the parish contending that the rent of 41,000*l.*, paid at the time of the first rate, and the annuity of 41,000*l.*, paid since the amalgamation, should be taken as the rateable value of the whole line to be apportioned among the different parishes ; the railway contending that the net earnings of the portion of the line in the parish should be taken as the rateable value. As the rate since the amalgamation is the most important, being the guide for future rates, I take that first.

(1) 81 R. R. 636 (15 Q. B. 379, 1085).

By the amalgamation the Reading and Reigate line, which was a feeder, has become part of the South Eastern line, as much as if it formed part of the original construction; so that, now, either all is line or all is feeder: the amalgamation in this case being in no respect distinguishable from the amalgamation of the Newbery and Hungerford line with the Great Western in *Reg. v. Great Western Railway Company* (1). There, the principle for rating a railway, by taking the net profit of the whole line as the rateable value of the whole, and by apportioning that rateable value among the parishes in proportion to the net earnings in each parish, was sanctioned and acted on. This principle was decided to be correct, after long consideration, in *Reg. v. London, Brighton and South Coast Railway Company* (2); *Reg. v. South Eastern Railway Company* (3); and *Reg. v. Midland Railway Company* (4); and I extract the principle as expressed in each of those cases. In *Reg. v. London, Brighton and South Coast Railway Company* (2) the parish of Croydon claimed a right to rate the railway on the principle of parochial *earnings, that is, at such a sum as a solvent tenant would pay as annual rent for the stations and portion of the railway within the parish regard being had to the net revenue earned in the parish; and this principle was affirmed by the Court. In *Reg. v. South Eastern Railway Company* (3) the parish of Westbere claimed to rate the Company for a portion of the branch to Ramsgate on the mileage principle of dividing the rateable value of the trunk and branches according to the distance in each parish. It was found that the traffic upon the main or trunk line was greater than upon any of the branches. The Company contended for the principle of parochial earnings, viz.: that they ought to be rated at such sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of Westbere, regard being had to the portion of profit earned by the portion of the railway within that parish, such rent being ascertained by taking the gross annual receipts from the portion of the railway situate in Westbere, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has during the year been carried by the Company over any portion of the line in Westbere, such proportion bearing the same ratio to the whole

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(1) 81 R. R. 636 (15 Q. B. 379, 1085).

(3) 81 R. R. 590, 612 (15 Q. B. 344, 358).

(2) 81 R. R. 590 (15 Q. B. 313, 358).

(4) 81 R. R. 590, 618 (15 Q. B. 353).

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sum paid by such passenger for the whole distance travelled by him as the distance in Westbere bears to the whole distance travelled by him; and calculating goods on the same principle; and taking from such earnings the deductions allowed by the Parochial Assessment Act: Held: that this principle of estimating the gross profits was correct, and that deductions were to be on the parochial principle also. It is said, in arguing (1): "Here there is *a parish including a portion of a branch line upon which it is found that the profits fall far short of those earned on the main line. The profits on which the rate is to be calculated are those arising within the rating parish." "The respondent parish has no right to any of the profits earned on the main line." The judgment of the Court supports this argument. In *Reg. v. Midland Railway Company* (2) the parish of Basford rated on the mileage principle; the Company contended that the rate ought to be estimated by reference solely to the net profits earned by the railway within that parish, without any reference to the net profits earned elsewhere, or to the rateable value of any portion of the railway lying in any other parish; the judgment affirms this principle. In *Reg. v. Great Western Railway Company* (3) the question was how the expenses of a railway were to be apportioned; and it was held that they also, where they are local, are to be apportioned to the parish where they arise, and deducted from the gross earnings in that parish, calculated on the principle laid down in the foregoing cases. Nothing more than the gross earnings in the parish were allowed to the parish, although it was found that it was profitable to the Company as proprietors of the entire Great Western Railway, by reason of the increased traffic brought thereby upon the main line, and the increased receipts upon that line between London and the western termini of it. As each parish is held entitled to rate for the earnings therein, as, for example, Croydon for all that is earned therein, it is clear that none of the other parishes on the line can rate for the tendency of the line situate in them to make the earnings in Croydon; the earning is profit; and, if the whole profit in Croydon is rated there, and the tendency to *create that profit is rated elsewhere, the same profit would be, in effect, rated twice, which is unlawful. Also it is clear that no tendency to create profit is rateable; no tenant would pay rent for a tendency to profit, unless it resulted in profit; and certainly no tenant of the

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(1) In the report in 20 L. J. (N. S.)
M. C. p. 140.

(2) 81 R. R. 590, 618 (15 Q. B. 353).
(3) 81 R. R. 636 (15 Q. B. 379, 1085).

part of the line in Dorking would pay rent to increase the profit of some other tenant of some other part of the line. As was mentioned in *Newmarket Railway Company v. St. Andrew's the Less, Cambridge* (1), in this Term, the annuity paid for the purchase of the line is no evidence of the rateable value where the profit is ascertained: it may afford a distant presumption when the profit is unknown: but, as a general rule, the cost of the production, or the price paid for the purchase, whether it be a sum or an annuity, is immaterial to show the rateable value: the question is, what rent would a tenant pay for it from year to year when the rate is made; and, in considering that, the tenant would disregard the cost price. It is also clear that the profit, during the year in which the rate is made, is the material fact for the guidance of the parish in making the rate; and they must use the latest information and adapt the rate thereto.

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In *Reg. v. London, Brighton and South Coast Railway Company* (2) the rate was made in November, based on a calculation of profit founded on the half-yearly return down to the preceding June; and, in the interval between June and November, the Company had expended 100,000*l.* on their plant, and claimed an allowance for that expense; and it was held they were entitled to it; the Court saying (3) that "the overseers, in making a prospective rate, are to make it on the supposed prospective *value ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value."

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With respect to the first rate, made during the lease at 41,000*l.* per annum, it is clear that the rent which is paid at the time of the rate is presumptive evidence of the rent at which it would let at that time; and it is also clear that, whatever may be the profit from the tenement, if, by reason of competition or otherwise, a higher rent could be obtained than the profit would warrant, it is to be rated at the rent which could be obtained. But the presumption from the amount paid may be rebutted. Thus, if an open coal mine be let at a rent, and it be proved that the mine has become exhausted, it is not to be rated at the rent agreed for while it was productive; and so, if an unopened coal mine was let at a rent, agreed for on the speculation that it would prove productive, if nothing was obtained, the rent would be no evidence of rateable value. Here the rent was agreed on before the railway was tried,

(1) *Ante*, p. 390.

(2) 81 R. R. 590 (15 Q. B. 313, 358).

(3) 81 R. R. 629 (15 Q. B. 367, 368)

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upon a speculation of profit both immediate on the line and mediate through feeding the trunk line ; and, if this speculation turned out a failure, the rent agreed for on that ground would be no proof of rateable value, and the presumption from the rent would be rebutted. But, with respect to the first rate, it is found that the line, at the time, was an object of competition to several lines, who would be willing to pay more than the profit would warrant ; the rateable value therefore would be the rent which it would let for under this competition ; and that rent would be the rateable value of the whole line, and would be to be apportioned among the parishes on the line in proportion to the length therein. My answer to the first question, therefore, *is : That, with respect to the first rate, a reference should be made to ascertain what rent could have been obtained for the line at the time of the rate ; and, with respect to the second rate, that a reference should be made to ascertain the rateable value upon the principle above described. And I have thus disposed of all that was material in the questions submitted.

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But, as the Judges differ on the questions, Whether a railway can be rated for more than it produces in the parish, on account of its tendency to make profit elsewhere, which is expressed by a metaphor from feeding, and on the question, Whether, in a case for apportionment, one parish in making its rate can disregard the portion of other parishes within the apportionment, and as a generality cannot be tested without a specific application, I suggest, if a case is again brought up relating to these points, it should state specifically what is the railway profit arising out of the parish which is liable to be rated within it.

COLERIDGE, J. :

This case raises two questions upon two separate rates ; the facts, existing when these rates were respectively made, slightly differ ; and in considering the points to be decided on each I will notice the difference. The defendants were an existing Company with a line formed from London to Dover, when the Reading, Guildford and Reigate Company was incorporated, by Act of Parliament, for the purpose of forming a line from the Great Western Railway to the defendants' line ; and the Act authorized the new Company to lease their line to the defendants. Before the line was completed, the two Companies appear to have negotiated as to the terms of the lease. First, it seems that the defendants

*had agreed to give 4*l.* 10*s.* per cent. on a capital not to exceed 600,000*l.*, and half the profits of the line; then it was arranged to commute this for 5*l.* 10*s.* rent, without any share in the profits; ultimately, on the completion of the line, the negotiations terminated in a lease for 1,000 years, at a rent of 33,000*l.*, clear of all rates and charges except income tax; and the lease also provided that the defendants should take on themselves the payment of 4*l.* per cent. interest on a bond debt of 200,000*l.*, incurred in making the line, amounting to 8,000*l.*, so that the defendants were substantially to pay 41,000*l.* a year for the occupation of the new line. The defendants took possession under this lease, and worked the line in connection with their main line and branches: they are the sole occupiers of all these lines, and carry on exclusively thereon the business of carriers of passengers and goods. For the distance of 341 chains, the leased line passes through the parish of Dorking; the parish officers of which, founding their assessment of the rateable value of these 341 chains upon the said sum of 41,000*l.*, which they treat as the rent of the whole line, have found it to be 2,228*l.* 2*s.* 6*d.*, and demanded a rate of 222*l.* 16*s.* 3*d.*: and, if the said rent is "the proper criterion of the rateable value," it is agreed that the assessment is correct.

I have had much doubt as to the meaning of the Sessions in the use of this language. If they mean that the correctness of the assessment is to depend simply on the amount of the rent, the rent being taken as the one fact, exclusive and conclusive, by which, as a mere matter of arithmetical calculation, the rateable value is to be measured, then I should think the parish officers clearly wrong, and that the assessment could not be confirmed. *The rent agreed for and paid may be always taken as evidence, more or less strong according to circumstances, of that supposed rent from which, by the statute, the rateable value is to be arrived at; and, being evidence on one side, if there be nothing to set against it, it may be of course conclusive. Still it is only evidence; and, where there are any other circumstances in the case to influence the inquiry, it never can be looked to solely and conclusively. Upon the best consideration I can give the case, and (as I have said) after much doubt, I have come to the conclusion that the parish officers have relied on it as the one governing test; and therefore I think the rate was made on a wrong principle, and cannot be affirmed.

The second rate now brought before us is made under these circumstances. By an Act of Parliament, passed in 1852, the

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defendants' undertaking and that of the Reading, Guildford and Reigate Railway Company were amalgamated: the lease came to an end: and the latter Company was thenceforth, absolutely and for ever, to be deemed part of the original undertaking of the former Company. By the same Act, the defendants were to pay to the shareholders of the Reading line 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each, making altogether 41,000*l.*, "by way of commutation for the yearly rent and other yearly sums payable under the recited lease." In making the rate for 1852, after the passing of this Act, the parish officers have taken the value of the 341 chains at 5,040*l.* 10*s.*, and assessed the defendants at 420*l.* 0*s.* 10*d.* Though it is not expressly stated, yet I infer, from the question proposed for our opinion, that they have done this on the ground that the value is increased simply by their now forming, not part of an independent line *demised to the defendants, but an integral part of the main line. I come to this conclusion, because no other change of circumstance is stated in the data for ascertaining the rateable value in the two assessments: and, as far as I understand the facts, they raise a very strong presumption against any increase in the rateable value being consequent upon this change. The annuities seem to me merely substituted for the rent as another denomination of the same amount. I do not say that the occupation in Dorking might not be more valuable by reason of the amalgamation; but there is no evidence stated to show that it is so; and the presumption is against it from the equality of the rent and annuities. This rate then only adds, to the faulty principle on which the first has been made, another, and therefore I think cannot be affirmed. I answer, therefore, the first question as to both rates in the negative.

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I understand the second and third questions to be intended to raise three points. First: Must the assessment be made only on the net profits earned by the passage of goods and passengers over the land occupied in Dorking, and must any additional value which the occupation in truth may have as increasing the traffic on the main line, be excluded? Secondly: May any additional value, which the occupation of the land in Dorking may have by reason of the amalgamation of the two lines, be included in the assessment? The two questions, I presume, were framed with a view to the different circumstances under which the two rates were made, in respect of the amalgamation. My answer to these questions will be this. Nothing is to be excluded which, I do not say has a

tendency to add to (for of this no notice can be taken), but, which actually adds *to, the value of the occupation; for the rate is to be regulated in amount by that value; and it is a principle, which I believe to be established by numerous decisions, that the inquiry is not so much where the profits of the occupation are produced, as whether any alleged profits are so directly referable to it as properly to be considered parts of the profit of the occupation, or, to adopt the words of Mr. Cripps in his sensible essay on the subject, "the rateable value within the parish may depend on matters without the parish" (1). I am not aware that this conflicts with any decision. This principle was first laid down and acted upon in regard to railways in *Reg. v. The London and South Western Railway Company* (2): and, as regards them, that case has been a governing authority ever since, from which I should be very sorry to depart. As I understand the two *Tilghurst* cases (3), nothing was decided in either that at all breaks in upon it; and I certainly intend to adhere to both of those decisions. The principle indeed was well established as early as *The New River* case (4); and I have long considered it as well settled that we are to apply the same principles to the rating the occupiers of railways as of any other property, though the application may be in some respects much more difficult, and the results not always so certainly attained. I by no means say that either the increase of the traffic on the main line, or the amalgamation of the two lines, has actually the effect of increasing the value of the occupation of the land in Dorking: that is purely a question of fact with which we have nothing to do. *And, if in fact, from either cause, such increase takes place, I am not prepared to point out to the parish officers how it is to be ascertained, or measured, or how it is to be distinguished from the general profits of the occupation in the parishes on the main line: that again is not within the province of the Court. It may well be that such increase may exist, and yet it may be so unimportant, or so difficult to ascertain, that, as mathematical accuracy in a rate is never to be expected, it may be more prudent on the whole for the parish officers not to press it into the valuation. But, subject to the effect of these remarks, which I make the more distinctly because I consider it of great importance

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(1) "How to Rate a Railway," p. 3. *Reg. v. Great Western Railway Company*,

(2) 55 R. R. 351 (1 Q. B. 558). 81 R. R. 636 (15 Q. B. 379, 1085).

(3) *Reg. v. The Great Western Railway Company*, 66 R. R. 340 (6 Q. B. 179); (4) *Rex v. The New River Company*, 14 R. R. 514 (1 M. & S. 503).

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for this Court always to abstain from expressing opinions on mere matters of fact, and to confine itself to laying down principles in questions of rating, my answer to the second question is this: That the assessment may, and indeed should, be made with respect had both to the rent and to any increased value which the occupation in Dorking may have by increasing the traffic on the main line. And I give the same answer in effect to the third question: that the respondents may and ought to take into consideration the value of the occupation as an integral part of the main line; in both cases, as I have already stated, if they can ascertain that the value is increased thereby, and in proportion as they find it increased thereby. It will be observed that in both cases I slightly alter the wording of the questions to what I understand to be the meaning they were intended to convey.

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It has been objected that these principles, when applied to railways, may lead to double rating, because the same proprietor may be assessed in respect of the *same profits in two parishes. I do not understand how the principle of rating can differ where there is one and the same occupier in two parishes from where there are two or more occupiers. If the occupier be the same, the properties are necessarily different in respect of which he is rated; and for this purpose he must be considered as a distinct person in each parish in which he occupies. In each the overseers will rate him in respect of the property in their parish; and they will estimate its value by what it produces, not merely there, but any where; if the profits of some other land in his occupation in another parish are mixed up with what the land in their parish produces, that ought to be the ground of a deduction from the assessment; and, if not made, the rate may be excessive in amount. It may be impossible to do this with mathematical accuracy; but to do it is the business of the parish officers in the first instance, of the Sessions in the second, but never of this Court.

If in the case of *The New River* the parish officers of Islington should assess the Company, looking only at the total profits received in their parish, and making no separation of, or allowance for, that share which was properly referable to Amwell and rateable there, they would overrate, and an appeal would lie: but this would be no ground for diminishing the rate in Amwell; for the excess in Islington ought to have been appealed against. If it has been, we must presume redress has been afforded; if it has not, the Company has acquiesced; either way the parish officers of

Amwell cannot be affected by the course pursued by those of Islington. How can that case be distinguished from this? The land and the water have a rateable value in Amwell, considered merely as such; *but it is small; they contribute, however, with other land and water elsewhere, to produce great profits, which are reaped, as it were, in Islington; and they are rated for the amount of this contribution. In Islington there is also land and water; and there the great mass of the profits is ostensibly produced: but the overseers there ought to separate, from the portion on which they are to rate, the portions which are really earned by the land and water in Amwell and the other parishes intervening. So, here, the land in Dorking has *per se* a rateable value; but it is said to contribute to produce, with other land in other parishes, great profits at the London terminus of the main line; and the occupier in Dorking has the contribution included in the rate on his land in Dorking; which therefore ought not to contribute to the rate in any other parish. Could the exact amount of that contribution be ascertained easily, not a doubt could exist that such rating was on a fair principle: but the difficulty of ascertaining the amount, surely, can make no difference in the principle. To clear up that difficulty, whatever it may amount to, is not the province of this Court, but of an accountant.

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Under the circumstances, therefore, it will be necessary in my opinion to send both rates to an arbitrator, to ascertain the proper amount according to the principles I have laid down.

LORD CAMPBELL, Ch. J.:

It seems to be most convenient to begin with the second question submitted to us in this case. And I am of opinion that the liability of the appellants, to be assessed to the relief of the poor in the parish of Dorking in respect of the portion of the Reading line in that parish, cannot be confined to the net profit derived *by the appellant from the traffic passing through that parish. They are only to be assessed in that parish in respect of property occupied by them in that parish; but its value in the parish may be enhanced by circumstances existing out of the parish. The appellants say truly that they are not to be rated in this parish for profits made elsewhere: I wish implicitly to abide by what is called "the parochial principle" of rating. But, upon that principle, we must see of what value the property rated in the parish is to the occupiers; and this is not necessarily determined by the

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pecuniary receipts for the use of it within the parish. The rent that was paid by the appellants is strong evidence that it was of greater value to them than the mere net profit from traffic upon it. We have an express admission that the Reading line brings "a great deal of additional traffic to the main line," and that they derive benefit from the Reading line "as a feeder to the main line, in respect of traffic conveyed upon that line;" and that the Reading line, "if in the market, might be an object of competition between the South Eastern Railway Company and other Railway Companies, the traffic on the main lines of which would be increased by the possession and control of the Reading, Guildford and Reigate line. Therefore, *plus* the net profit derived from the traffic passing through the parish of Dorking, the appellants do derive a profit from the occupation of the portion of the line in that parish. But it is said that in respect of this last profit they ought only to be assessed in the parishes through which the main line passes. I am of a contrary opinion. This profit, although not received for the traffic upon the line in the parish of Dorking, originates from the occupation by the appellants of land in the *parish of Dorking; and, if they are assessed in that parish in respect of this profit, in estimating their profits in the parishes through which the main line passes there ought to be a deduction in respect of what is paid for the line which is worked as a feeder to the main line. This calculation, though difficult, may be made upon data which are accessible, and is not more difficult than calculations, which must be made in railway rating, where stations and inclined planes in one parish affect the traffic in another parish. Adhering to the parochial principle, I inquire of what value the land rated is to the occupier. Of this value the rent he is willing to pay for the land affords evidence; and, from any profit which he indirectly makes from it out of the parish, part of the rent which he pays for it in the parish is to be regarded as a deduction. At the Bar it was hardly denied that this would be the result if the two railways belonged to different Companies, and if the Company whose railway is fed were to pay a regular fixed annual sum to the Company whose railway is the feeder. But I do not see how it should make any difference to the parish of Dorking that both lines are occupied by one Company and are worked as one concern. The advantage derived from the occupation of the portion of the line in that parish is still the same, although the process by which the amount of that advantage is to be calculated is changed. I adhere to the rule of

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rating which I had laid down in *The Newmarket Railway Company v. St. Andrew's the Less, Cambridge* (1), and which I there attempted to support and illustrate. This I think is in entire harmony with our decision in *Reg. v. Great Western Railway Company* (2). In many cases the supposed *advantage derived by a Railway Company from a portion of a railway in a particular parish bringing passengers and goods to another portion out of the parish may be almost inappreciable; and I would earnestly dissuade parishes from ever making any claim under this head, unless where upon clear evidence the claim can in point of fact be established.

In answer to the third question, I say that the respondents are not entitled to treat the Reading line as an integral part of the South Eastern Railway so as to depart from the parochial principle; but they are entitled to consider in the assessment the value of the Reading line to the appellants beyond the traffic passing through the parish of Dorking.

In answer to the first question, I cannot say that the rent under the lease or the annuity payable under the last Act of Parliament is necessarily the criterion of the assessable value.

And therefore, according to the arrangement agreed upon between the parties if this should be our opinion, the matter must go back to the Quarter Sessions, or to an arbitrator, to determine the proper amount of assessment in conformity with the opinion pronounced by a majority of the Court upon the second and third questions.

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ELMER v. LOCAL BOARD OF HEALTH OF NORWICH.

(3 EL. & BL. 517—529; S. C. 2 C. L. R. 886; 23 L. J. Q. B. 203; 18 Jur. 870.)

1854.

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Where the Public Health Act, 1848 (11 & 12 Vict. c. 63) (3), is applied to a district comprising several parishes, the expenses of repairing and maintaining the highways, within the district, are to be met by a district rate to be levied by the local board of health under that Act, and not by highway rates, though the local board of health is, by s. 117, to act as surveyor of highways within the district.

[Superseded by later legislation : see 38 & 39 Vict. c. 55.]

(1) *Ante*, p. 390.

(3) Repealed : 38 & 39 Vict. c. 55,

(2) 81 R. R. 636 (15 Q. B. 379, 1085). s. 343.

LE FEUVRE *v.* LANKESTER (1).1854.
Feb. 8.(3 El. & Bl. 530—545; S. C. 2 C. L. R. 1426; 23 L. J. Q. B. 254; 18 Jur. 894;
2 W. R. 307; 22 L. T. O. S. 282.)

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By a provisional order of the General Board of Health, confirmed by statute, the Public Health Act, 1848 (2), was applied to a district wholly comprised within a single municipal borough, and the Corporation were constituted, by the council, the local board of health. L., an alderman of the borough, after such confirmation, sold some iron to a party who had contracted to supply the local board with iron railings, and who purchased the iron for the purpose of performing his contract. L. afterwards, continuing to be an alderman, was elected mayor, and acted as such. An action was then brought against him for penalties, under sects. 28, 53, of stat. 5 & 6 Will. IV. c. 76 (3) for having acted as mayor while disqualified by being interested in a contract with the council:

Held, assuming a contract with the local board to be a contract with the council, within stat. 5 & 6 Will. IV. c. 76 (3), s. 28, and assuming also that a mayor, elected when alderman, is disqualified to act as mayor, under sect. 53, by reason of a disqualification as alderman:

That, nevertheless, this was not an interest in a contract within sect. 28, and there was no liability to penalty.

L. had contracted to construct some waterworks for Commissioners for supplying the town with water. This contract not having been fully carried out, he gave it up, by deed, to the Commissioners, they agreeing to pay him a certain balance if they abandoned the works, or completed them and obtained a specified quantity of water. The deed contained releases on each side, and covenants by L. not to molest the Commissioners, that he had not injured the title, and for further assurance. The local board were afterwards constituted the Commissioners. The works remained incomplete, but not abandoned, while L. was alderman, and also while he was mayor.

Held, on the same assumptions as before, that L. was not liable to a penalty: for that this contract was taken out of the operation of sect. 28 of stat. 5 & 6 Will. IV. c. 76 (3), as being a "security for the payment of money only," within stat. 5 & 6 Vict. c. 104, s. 1 (3).

DEBT for penalties. The first count was for three penalties alleged to have been incurred by defendant having acted as mayor of the borough of Southampton "after he had become, and whilst he was, disqualified to hold that office, by reason that he acted as mayor without being duly qualified at the time of making such declaration as is required by stat. 5 & 6 Will. IV. c. 76, that is to say, after defendant had been elected as alderman of the borough, and after he had been elected, out of the aldermen of the borough, the mayor thereof; and, at the same time when defendant made the said declaration, and whilst he claimed to use and exercise the

(1) All the statutes referred to in the head-note are repealed. See now the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 12 (2).

(2) Repealed: 38 & 39 Vict. c. 55, s. 343.

(3) Repealed: 45 & 46 Vict. c. 50, s. 5.

offices of mayor and alderman of the borough, he had, directly and *indirectly, by himself and his partner one William Lankester, divers shares and interests in divers contracts and employments with, by and on behalf of the council of the said borough."

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Second count, for three penalties alleged to have been incurred by acting as mayor of Southampton "after he had been elected out of the aldermen of that borough the mayor thereof; and, whilst he was disqualified to hold the office of mayor of that borough, and also the office of an alderman thereof, that is to say, by reason that defendant whilst so acting as aforesaid, and after he had been elected an alderman of that borough, and whilst he claimed to use and exercise the said offices, directly and indirectly, by himself and his partner" &c., as in the first count.

Plea: Not guilty, by statute. Issue thereon.

On the trial, before Talfourd, J., at the last Winchester Summer Assizes, it appeared that the defendant was, in November, 1850, elected an alderman of Southampton; and in November, 1852, he was elected mayor, and had since acted as such.

By a provisional order of the General Board of Health, confirmed by stat. 13 & 14 Vict. c. 108 (Royal Assent, 15th August, 1850), the Public Health Act, 1848, (except sect. 50) was ordered to "apply to and be in force within and throughout the entire area, places, and parts of places, comprised within the boundaries of the said town of Southampton, as the same were fixed for the purposes of" stat. 5 & 6 Will. IV. c. 76, "and that the town and places and parts of places shall be and constitute one district for the purposes of the said Public Health Act accordingly. And that the mayor, aldermen and burgesses of the said town of Southampton shall be by the council of the said town, within and for *the said district, constituted the local board of health under that Act." After they were so constituted, the local board of health ordered some works to be done, in the course of which it was necessary to erect some lamps and a considerable quantity of iron railing. The superintendent of the works in 1851, whilst defendant was an alderman, ordered this ironwork at a foundry belonging to defendant and his partner; and they supplied it. It appeared that much the greater part of this work was let to contractors who were to supply the ironwork; and it was the contractors who paid Messrs. Lankester for this part of the iron. But a very few small articles were for extra work, not included in the contract; and for those the town council, as local board of health, paid Messrs. Lankester directly.

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LE FEUVRE It did not at all appear that at the time the goods were supplied
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LANKESTER. Messrs. Lankester were aware that any part consisted of extras.

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The plaintiff also put in evidence a deed, dated 22nd May, 1846, and made between defendant, T. B. and J. H., of the first part, and five of the Commissioners acting in pursuance and execution of stat. 6 & 7 Will. IV. c. xcvi. (1), of the second part. This deed recited a contract bearing date 23rd March, 1838, between a person of the *name of Collier and the Commissioners, by which Collier was to proceed without delay to make an artesian well, with the necessary works, and obtain a daily supply of not less than 40,000 cubic feet of spring water. And, if Collier abandoned the undertaking without completing it, he was to refund the price paid to him, amounting to 8,930*l.* It also recited a bond, by which defendant, T. B. and J. H. became sureties for Collier. It then recited other deeds, the effect of which was, that, Collier not being able to complete the work, his sureties took his contract from him and entered into fresh agreements with the Commissioners in 1840, by which defendant, T. B. and J. H. were to do the work on certain terms. The deed then recited that much of the work had been done, and that disputes had arisen between defendant and his co-contractors, on the one part, and the Commissioners on the other, as to whether defendant and his co-contractors were entitled to be paid part of the stipulated price, and as to whether they had broken some of the stipulated terms; and that, to compromise all these disputes, it was agreed that the work should be given up to the Commissioners, that the Commissioners should permit defendant and his co-contractors to retain the amount which had been paid to them, amounting to 8,886*l.* 2*s.* 9*d.*, and, in addition, 4,000*l.*, in full for all compensation claimed by them for various things then existing; and a further sum of 850*l.* was to be paid in case either

(1) Local and personal, public: "For maintaining the public conduits and other waterworks belonging to the town of Southampton, and for providing an additional supply of water for the inhabitants of the said town and neighbourhood." Sect. 9 constituted the mayor, recorder, aldermen and councillors, with twenty-six elected inhabitants, qualified as there described, Commissioners. Sect. 10 incapacitated any person from acting as Commissioner "in any case wherein he shall be in anywise personally or

beneficially interested in the matter in question, either touching any contract relating to the execution of the powers of this Act, or otherwise (except as a creditor on the rates or assessments)." Sect. 13 imposed a penalty of 5*l.* for every occasion of a disqualified person acting as Commissioner. The provisional order, before mentioned, repealed these (among other) sections, from and after the passing of any Act confirming the order.

the Commissioners abandoned the works altogether, or succeeded in completing them. The indenture then contained a bargain and sale of the works to the Commissioners, in consideration of a release of the 8,886*l.* 2*s.* 9*d.*, and the payment of 4,000*l.* down: with a release from the Commissioners to the defendant *and his co-contractors, and a covenant by the Commissioners, on behalf of themselves and their successors, with defendant and his co-contractors, that, "in case the said Commissioners, their successors or assigns, shall, at any time hereafter, abandon the said water works without having completed the same and brought the same into operation; or in case the said Commissioners, their successors or assigns, shall complete the said works and bring the same into operation, and shall be able to obtain by means of the said works, in each and every day of 24 hours during the entire period of 12 calendar months next after the completion of the said works (any temporary deficiency arising by means of temporary accidents which may at any time happen to the machinery or works being excepted), from the chalk stratum of the depth of not less than 480 feet from the surface, and raise to the surface, and force and supply into the reservoirs on the Southampton Common, the full quantity of 40,000 cubic feet of pure spring water, the amount of such daily supply (except as before excepted) to be ascertained" by gauging, and the purity of the water supplied to be ascertained by investigation; "then, and in either of the said cases, the said Commissioners, their successors or assigns, shall and will, by and with the first moneys which at or after the happening of such abandonment, or the expiration of such calendar months, as the case may be, shall be in, or under, or come to, the hands or control of the said Commissioners, their successors or assigns, and be applicable in that behalf," pay to defendant and his co-contractors 850*l.*, without interest, and without any deduction. The deed also contained covenants by the defendant and his co-contractors not to molest the Commissioners in the enjoyment of the works given *up to them: that they had not by their own acts injured the title; and for further assurance.

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By the provisional order of the General Board of Health, and the confirming Act (13 & 14 Vict. c. 108), the local board of health of Southampton were constituted the Commissioners for executing (amongst other local Acts) stat. 6 & 7 Will. IV. c. xcvi.: and all contracts &c. by the Commissioners were thenceforth to be transferred to and fulfilled by the local board of health of Southampton. Before the time when the defendant became an alderman, the

LE FEUVRE local board of health were in possession of the waterworks, and
LANKESTER. had paid the 4,000*l.* They were still, at the time of the action, at work upon them, and had not yet obtained the stipulated quantity of water, so that neither of the contingencies on which the 850*l.* was payable had yet been determined ; and so far the contract continued open ; in all other respects it had been performed.

The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant. *Kinglake*, Serjt., in last Michaelmas Term, obtained a rule *nisi* accordingly.

In this vacation (1),

Crowder, Montague Smith and H. Bullar showed cause :

[*536] The action is to recover penalties which, by stat. 5 & 6 Will. IV. c. 76, s. 53, are incurred by any person who “ shall act as mayor, alderman, or councillor, or auditor or assessor, for any borough ” “ without being *duly qualified.” The same Act, sect. 28, enacts that * * no person shall be qualified “ to be elected or to be a councillor or an alderman of any such borough, during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such council ; provided that no person shall be disqualified from being a councillor or alderman of any borough as aforesaid by reason of his being a proprietor or shareholder of any Company which shall contract with the council of such borough for lighting or supplying with water or insuring against fire any part of such borough.” It has been suggested that sect. 53 relates only to the disqualifications imposed by sect. 52, such as accrue on becoming bankrupt, insolvent, &c. But these disqualifications are such as accrue, after taking office, to “ any person holding the office ; ” whereas the words of sect. 53 are “ if any person shall act ” “ without being duly qualified ; ” and the acting without having made the declaration which must be made immediately after the election is there mentioned among other causes of penalty. Sect. 53 therefore must have a more extensive application ; and sect. 28 must be looked to.

[*537] (*COLERIDGE, J.* : Sect. 53 imposes penalties on an auditor *and assessor acting without being duly qualified : there is nothing in sect. 52 as to the disqualifications of these officers.)

(1) The argument commenced on before the same Judges. *Erle, J.* left February 6th, before *Coleridge*, the Court towards the conclusion of *Wightman, Erle and Crompton, JJ.*, the argument on the second day, and was concluded on February 7th,

That is conclusive. Besides, sect. 52 contains no positive qualification; and sect. 53 imposes the penalty for acting "without being duly qualified." It is true that the disqualification arising from being interested in a contract is created by sect. 28, which is, in terms, applicable only to a "councillor" or "alderman;" the word "mayor" having been by some oversight omitted. But, by sect. 49, the mayor must be elected out of the aldermen or councillors; and, therefore, if the defendant, at the time of his election, was not qualified as alderman or councillor, he was not qualified as mayor: *Reg. v. Preece* (1), *Reg. v. Dixon* (2). Unless this construction be put upon the Act, there is nothing in it to prevent the mayor from being interested in every contract. Possibly, in the case of the election of an outgoing alderman as mayor, the mayor might not be disqualified by reason of becoming contractor after he ceased to be alderman and while he continued mayor: that may be a *casus omissus*. But the difficulty does not arise here, as the defendant continued to be alderman while he was contractor. Then, assuming that the mayor is disqualified under the same circumstances as those under which an alderman would be disqualified, there are two grounds here for holding the defendant disqualified.

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First: the supply of ironwork by the defendant and his partner for the works executed by order of the town council was a disqualification: *West v. Andrews* (3).

(CROMPTON, J.: That was an action for penalties under *stat. 55 Geo. III. c. 137, s. 6, the words of which are much more extensive than those of stat. 5 & 6 Will. IV. c. 76, s. 28. If the contract with those executing the works had been colourable, so that Lankester was really interested in the contract, it would be another affair. The fact, that goods used in a contract were supplied by a member of the council, may be evidence that he has a concealed interest in the contract. But nothing of the sort is found here; and it would be a very strong thing to hold a member of the council liable to penalties, because in the ordinary course of trade a contractor bought articles at the member's shop.)

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It is within the mischief meant to be provided against. * * *

Next: the deed of 1846 is, by virtue of the provisional order and confirming Act, now a direct contract with the local board of

(1) 64 R. R. 457 (5 Q. B. 94).

(3) 24 R. R. 394 (5 B. & Ald. 328).

(2) 81 R. R. 497 (15 Q. B. 33).

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health of Southampton ; and, as “the mayor, aldermen and burgesses” of Southampton are “by the council of the said town” the local board of health, it is a contract with such council. * *

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The existing contract, by the deed of 1846, is one which makes the defendant's right to 850*l.* depend on an act in the option of the council ; he cannot be unbiassed in determining any question which may be raised as to whether the council shall or shall not discontinue the works. The case is therefore clearly within the mischief contemplated by the Act. Neither is it within stat. 5 & 6 Vict. c. 104, s. 1, which excepts from the operation of stat. 5 & 6 Will. IV. c. 76, s. 28, “any security for the payment of money only ;” for this is a contract to pay money on a contingency ; and there are also covenants for further assurance, and others which prevent this from being a security for money only.

(WIGHTMAN, J. : You will exclude many securities, upon that view. Suppose a mortgage with covenants.)

What was merely incidental to the security by mortgage would probably not prevent the application of the clause. But here are other provisions, such as the release. * * *

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Kinglake, Serjt. and Phinn, contra :

In the first place, sect. 53 of stat. 5 & 6 Will. IV. c. 76, seems to refer more naturally to the disqualifications specified in the section immediately preceding than to those in sect. 28.

(WIGHTMAN, J. : Sect. 53 seems to include being unqualified under sect. 28 and becoming disqualified under sect. 52.)

That is not consistent with the naming of the mayor in sect. 52 and the omission in sect. 28. And, next, sect. 28 is confined to the functionaries there named, and does not include the mayor. The disqualification must be connected with the character in which the party, whom it is meant to charge with the penalty, is acting. Here the defendant is charged with acting, not as alderman or councillor, but as mayor. The omission of the mayor from sect. 28 may not have been accidental : good reasons may have occurred to the Legislature for not disqualifying, upon all the grounds of disqualification expedient in the case of an inferior functionary, the head of the corporation, an indispensable officer. But, further,

assuming the applicability of sect. 28 to the case of a mayor, the defendant is not brought within it.

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First, as to the sub-contract for the iron. (On this point they were stopped by the Court.)

Next, supposing the deed of 1846 to show a contract *such as would, in its nature, fall within sect. 28, it is not a contract with the council at all. * * But, further, stat. 5 & 6 Vict. c. 104, s. 1, is applicable. The contract, if it be still open, is a security for the payment of money only. The other stipulations, such as mutual releases, are ancillary to that. The covenants for quiet enjoyment and title would have been implied had they not been expressed: *Shep. Touch. 160, Line v. Stephenson* (1). The contingency does not make it less a security for money than a bond conditioned to pay money when J. S. shall return from Rome. The interest in it would pass by a devise of all the defendant's securities for money.

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Cur. adv. vult.

COLERIDGE, J., on a subsequent day in this vacation (February 8), delivered the judgment of the Court:

In this case we are of opinion that the rule must be made absolute. In the argument before us, several questions were raised, which in the end resolved themselves into three.

As to one of those, namely the sub-contract as to the supply of ironwork, we expressed our opinion during the argument. There was nothing in that to disqualify the defendant. The term sub-contract was used: but in fact it was no sub-contract; for it was not the case of a person having a contract with the council employing a member of the council to perform part of it. But, if *it had been a sub-contract, the word is not in the Act: to disqualify him, he must directly or indirectly have a share or interest in some contract or employment. In the present case all that is asserted is that the defendant, in the course of his trade, sold certain ironwork which was used in carrying out the contract. There is no attempt to show fraud, or any previous concert between the defendant and the contractor by which the defendant was to have the benefit of the contractor's custom. Then this gives the defendant no share or interest in the contract, the existence of which neither affects the price of his goods nor the manner in which he is to be paid for them. It is said that it is within the mischief of the Act,

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(1) 44 R. R. 819 (4 Bing. N. C. 678).

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for that the defendant, as mayor, may have to decide on the quality of his own goods. Even if the case be brought within the mischief, it is not within the words of the enactment: and we must not strain a penal enactment so as to bring cases within it. But many instances might be put in which kindred and affection, and other things clearly not within the Act, might bias the mind of the mayor to a greater degree, and so be as much within the mischief as this.

Then we come to the point mainly contested, viz. the effect of the deed of 1846. First, a preliminary question arises, namely, whether, on the municipal corporation being, by the council, made local board of health, a contract with them in that capacity is a contract with the council within the meaning of stat. 5 & 6 Will. IV. c. 76, s. 28. On that it is unnecessary to decide; and all that we wish to express is that we desire not to be understood to encourage the opinion that it is not.

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Having said this, it brings me to the point on which *we decide the case. On looking at the deed, we find that Lankester, with others, had become party to a contract to complete works for supplying water. He and they made over the works to the Commissioners, now represented by the local board of health; and they agreed to pay him a sum of money, the balance of which, 850*l.*, was to remain unpaid till the happening of an alternative, if the Commissioners abandoned the works without completing them, or, having completed them, obtained a specified quantity of water. In either case the Commissioners were to pay the 850*l.* It seems to us, if that is all, that this is clearly within stat. 5 & 6 Vict. c. 104, excepting from stat. 5 & 6 Will. IV. c. 76, s. 28, "any security for the payment of money only." It is true the payment is only to be on the happening of a contingency; but the fact that the payment of money is to be on a contingency does not make the instrument securing the payment less a security for the payment of money. But the deed contains covenants, on Lankester's part, not to molest the Commissioners, and for further assurance; and these are relied on by the plaintiff as making it not a security for money only. But these covenants are ancillary to the security, and are of a nature which, independently of stat. 5 & 6 Vict. c. 104, would not be within stat. 5 & 6 Will. IV. c. 76.

It will be observed that we have assumed, throughout, that sect. 28 applies to the case of the mayor. It has not been necessary to decide this; as, assuming it to do so, the plaintiff's case fails.

Rule absolute.

REG. v. INHABITANTS OF SANDON.

(3 EL. & BL. 547—548; S. C. 2 C. L. R. 1699; 23 L. J. M. C. 129; 18 Jur. 401.)

An indictment preferred at the Assizes, for non-repair of a highway, by order of justices under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 95, is removeable by *certiorari* at the instance of the defendants.

A JUSTICE of peace for Hertfordshire issued a summons to the surveyors of the highways of the parish of Sandon, in Hertfordshire, to appear to answer an information laid before him, for non-repair of a highway in that parish, alleged to be repairable by the inhabitants. The surveyors appeared before two justices of the county, and denied the liability: whereupon the justices ordered an indictment against the inhabitants to be preferred at the next Assizes for Hertfordshire. *The indictment was preferred accordingly at such Assizes, and a true bill found. The defendants removed the indictment into this Court by *certiorari*.

Lush now moved for a rule to show cause why a *procedendo* should not issue. The proceeding has taken place under sect. 95 of the General Highway Act, 5 & 6 Will. IV. c. 50. The justices under that section may order the indictment to be preferred either at the Quarter Sessions or at the Assizes: and, by the proviso, an indictment preferred at Quarter Sessions may be removed by *certiorari*. But no power is given to remove an indictment preferred at the Assizes. Sect. 107 enacts that no "matter or thing done or transacted in or relative to the execution of this Act, shall" "be removed or removeable" "by *certiorari*." Taking the two sections together, it seems that the *certiorari* may go to remove from Quarter Sessions, but not from the Assizes.

(CROMPTON, J.: Express words are wanted to take away *certiorari*.)

LORD CAMPBELL, Ch. J.: It would be very odd if you could remove from one and not from the other.)

The Quarter Sessions is a Court of lower rank than that of the Assizes.

(CROMPTON, J.: A power of reviewing is desirable.)

LORD CAMPBELL, Ch. J.: The indictment is ordered under the Act; but it is found at common law; the case therefore is not within sect. 107.)

Per CURIAM (1):

Rule refused.

(1) Lord CAMPBELL, Ch. J., ERLE and CROMPTON, JJ. Wightman, J. had left the Court.

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STOESSIGER v. SOUTH EASTERN RAILWAY COMPANY (1).

(3 EL. & BL. 549—558; S. C. 2 C. L. R. 1595; 23 L. J. Q. B. 293; 18 Jur. 605; 2 W. R. 375; 23 L. T. O. S. 65.)

C., being indebted to G. in more than 10*l.*, framed a document, directed to himself, ordering himself, three months after date, to “pay to my order” the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer’s name. C. wrote on it his acceptance, and caused it to be forwarded in a parcel, directed to G., by a common carrier, in order that G. might add his name as drawer.

On an action against the carrier for the loss of other goods, of less value than 10*l.*, contained in the same parcel, the defence was that the parcel contained a bill, order, notice, security for payment of money, or writing of value, exceeding 10*l.*, and that no notice had been given of the contents, or increased rate of carriage paid or contracted for, though the carrier had publicly exhibited in his office a notice requiring an increased rate for articles within the Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68), s. 1. The jury found that the incomplete bill was not, at the time of the delivery to the carrier, of any value:

Held, that it was not a bill, order, note, security for payment of money, nor writing of any value, at the time of such delivery.

Quære, per ERLE, J., whether, if the jury had found the value in fact, such a finding could or could not have been supported.

THE declaration stated that defendants were proprietors of a railway, to wit a railway from Strood in Kent to London, and were common carriers of goods and chattels for hire: and plaintiff caused to be delivered to defendants, as such common carriers, a certain parcel and divers goods and chattels of plaintiff contained therein, to wit certain papers and documents of small value and the sum of 9*l.* 10*s.* in cash, to be safely and securely carried and conveyed for plaintiff by defendants from Strood upon the said railway and upon and by other railways and conveyances, and to be caused by defendants to be safely and securely delivered for plaintiff to the consignee of the said parcel, to wit one Gideon Gould, at a certain other place, to wit Birmingham, for certain reasonable reward: yet defendants, not regarding their duty as such common carriers, but contriving &c., *did not nor would safely or securely carry &c. the parcel to Birmingham, nor there cause the same to be safely and securely delivered for plaintiff to the consignee, but, being such carriers, so carelessly and negligently

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(1) *Harvey v. Cane* (1876) 34 L. T. 50 L. J. M. C. 90, 44 L. T. 615; *Reg.* 66; *Baxendale v. Bennett* (1878) 3 *v. Bowerman* [1891] 1 Q. B. 112, 63 Q. B. D. 525, 532, 47 L. J. Q. B. 624; L. T. 534.
Reg. v. Harper (1881) 7 Q. B. D. 78,

conducted themselves in the premises that, by and through the carelessness, negligence and improper conduct of defendants in that behalf, the said parcel was opened after the same had been delivered to defendants as aforesaid, and before the same was delivered to the consignee: and the said sum of 9*l.* 10*s.* in cash, being part of the contents of the said parcel, was abstracted therefrom by some person or persons whose names or name are to plaintiff unknown: and the parcel and part only of the said goods and chattels contained therein, to wit the said papers and documents of small value, were delivered to said consignee; and the residue of the goods and chattels contained in the parcel, to wit the said sum of 9*l.* 10*s.* in cash, was never delivered to the consignee: whereby the said sum of 9*l.* 10*s.* was not safely or securely carried or conveyed or caused to be delivered as aforesaid, but became and is wholly lost to plaintiff.

The only plea material to the decision of the Court was the third, which was as follows.

That the said parcel, at the time of the said delivery thereof to and receipt by defendants of the same, contained property of a certain description, to wit money and current coin of the realm, and a bill of exchange for the payment of money; and the value of the same exceeded the sum of 10*l.*: and that the said parcel, with its said contents, was delivered to defendants, as common carriers of goods by land, to be by them conveyed and *carried as in the declaration mentioned at a certain office or receiving house of defendants for the receipt of goods to be carried by them, as such carriers as aforesaid. That, before and at the time when the said parcel with its said contents were so delivered at the said office or receiving house, defendants had caused to be affixed, and there was then affixed, according to the form of the statute in such case made and provided, in legible letters or characters, in a public and conspicuous part of the said office or receiving house, a notice stating that a certain increased rate of charge therein mentioned was required to be paid, over and above the ordinary rate of carriage, for the safe conveyance of certain articles in the said notice mentioned; and among which money and bills of exchange were included and stated. That the nature and value of the said contents of the said parcel were not declared by plaintiff or by the person who sent or delivered the said parcel and its contents at the said office or receiving house; nor was the said increased charge, nor any engagement to pay the same, accepted by the person receiving the same at the said office or receiving house.

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Replication. That the value of the said parcel, and its contents, did not exceed the sum of 10*l*.

Issue thereon.

On the trial, before Crompton, J., at the Westminster sittings in last Michaelmas Term, the following facts appeared. The plaintiff was a commercial traveller in the employment of Gideon Goold, named in the declaration, who resided at Birmingham. A person named Cruttenden, residing at Chatham, being indebted to Goold to the amount of 11*l*. 10*s*., gave to the plaintiff at *Chatham, to be by him transmitted to Goold, an instrument of which the following is a copy :

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" £11 : 10 : 0.

BIRMINGHAM, Sept. 1852.

" Three months after date pay to my order the sum of eleven pounds 10*s*. value received.

" Mr. CRUTTENDEN

" Jeweller &c.

" Chatham." at

Accepted by
G. CRUTTENDEN.

Goold was to complete this instrument, which was stamped with a two shilling bill stamp, by signing his own name as drawer. The plaintiff had no authority to draw or accept bills for Goold. He accordingly inclosed the document, together with gold and silver to the amount of 9*l*. 10*s*. on account of a private debt of his own to Goold, in a parcel, which he directed to Goold at Birmingham, and delivered to defendants, at their station at Strood, to be carried ; and which they received for that purpose. There was affixed, in a conspicuous part of the office where the parcel was received, a notice, requiring an increased rate of charge, according to stat. 11 Geo. IV. & 1 Will. IV. c. 68, ss. 1 and 2, for the articles specified in sect. 1. No notice of the value or contents of the parcel was given, nor any increased rate paid or agreed for. The cash was abstracted from the parcel, by some means which did not appear, before it reached Goold : the remainder of the contents came safely to hand.

On this evidence, the counsel for the defendants contended that the parcel contained, within the meaning of the Carriers' Act, stat. 11 Geo. IV. & 1 Will. IV. c. 68, s. 1, gold or silver coin of the realm, and a bill, note or security for payment of money, or writing, the value of the whole exceeding 10*l*. ; and that, no notice of the *value or contents having been given, or increased rate paid or contracted for, the defendants were not liable for the

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loss. The plaintiff's counsel contended that the document, being incomplete, was of no value as a security or writing, and that therefore the parcel contained no articles, within the meaning of the statute, of the value of more than 9*l.* 10*s.* The learned Judge directed a verdict for the plaintiff for 9*l.* 10*s.*, reserving leave to move to enter the verdict for the defendant if the skeleton bill was an article within the Carriers Act, and was of such a value as to make together with 9*l.* 10*s.* more than 10*l.* It was agreed that the jury were to be taken as finding, so far as it was a question for them, that the writing was of no value.

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In last Michaelmas Term, *Willes* obtained a rule *nisi* accordingly.

Alfred Wills now showed cause :

The question is, whether this document was of any value as a bill or note, security or writing, within the meaning of the statute. It was not a bill of exchange; for there was no drawer. Nor was it a promissory note. In *Peto v. Reynolds* (1) a person drew a bill of exchange without any direction; and another person accepted it in defendant's name, professing to do so as agent for defendant. The Court appeared disposed to consider that this was not a bill of exchange, though, if the defendant ratified the promise to pay, it might be treated as his promissory note. But there the document, whether a bill or promissory note, was a promise by a person named, to pay to the order of another named: here Goold has not become a party in any way; nor is he named. There is neither drawer or payee. The *only name on the document is that of Cruttenden; and he does not engage to pay, except to the order of a person not named, and who has in fact made no order. Cruttenden cannot have meant to pay the bearer generally.

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(LORD CAMPBELL, Ch. J.: That would be utterly contrary to his meaning in fact.

Willes said that he would offer no argument in favour of its being a promissory note, but would avail himself of that point, should the Court think it tenable.)

Nor does it fall under the head of "securities for payment of money." * * Further, if it is contended that this was a writing of the value of 11*l.* 10*s.*, the answer is that the value which is to bring the case within the statute must be a value existing at the

(1) 96 R. R. 772 (9 Ex. 410).

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time of the delivery to the carrier. But, as no one had authority to complete the instrument besides Goold, the paper could never acquire any value *till it reached Goold's hands, that is, till the duty of the carrier was over. The value, at the time of the delivery, was merely that of the paper; no value derived from the writing on it existed at that time. The supposed value is in the piece of paper *plus* the authority to do something to it which has not been done here. The piece of paper was sent by the carrier: the authority could not be sent: and neither of these elements apart from the other is sufficient to make the instrument of value. * * There are many cases in which a party to an incomplete instrument becomes liable upon the completion: *Schultz v. Astley* (1) is an instance, and represents a class of cases. But the liability never arises, and consequently the value of the instrument never is created, unless the completion is by an authorized party. Suppose this instrument to have been lost, no one except by means of forgery, or at least of some fraud, could make it available.

(LORD CAMPBELL, Ch. J.: You need not labour to show that a person having no authority to sign it would commit a forgery in doing so.

CROMPTON, J.: If Goold had died during the transit, could his executors have completed the instrument?)

They could not. In whose name could they sign?

(LORD CAMPBELL, Ch. J.: If the carrier had lost the paper, could Goold have recovered the sum named in it by an action for damages against the carrier?)

He could not. And this shows that the object of the statute does not require the interpretation for *which the defendants must contend; because, if the instrument be worthless, the carrier requires no protection from the consequences of its loss.

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Willes, contra:

From the list of articles in sect. 1 it appears that the Legislature did not mean to confine the provision to such things as are valuable in the hands of every person: gold and silver are so; but "writings" and "title deeds," though very valuable to their owners, are commonly worthless to others. Therefore the Court

(1) 42 R. R. 651 (2 Bing. N. C. 544).

will not inquire to whom this paper was valuable. After the paper left Cruttenden's hands, any one deriving authority from Goold might make it complete and valuable. In the case put by CROMPTON, J., Goold's executors or administrators could have signed it: *Murray v. The East India Company* (1) seems to go as far as that. In *Schultz v. Astley* (2) it was held that the conduct of the acceptor gave such authority even to a stranger.

(CROMPTON, J. : That case goes to the utmost extent of the law.)

But it is enough that the paper was valuable as a writing; it was that which the creditor might use, and might obtain money for by discounting it. Further, suppose the paper to have got into the hands of a *bonâ fide* transferee.

(LORD CAMPBELL, Ch. J. : How could that possibly happen without its passing through Goold's hands?)

It is not probable, but it seems not impossible; the cases are collected in Mr. Smith's note to *Miller v. Race* (3).

(WIGHTMAN, J. : If a man found it, and inserted his own name, and indorsed it over for value, might the indorsee recover on it?)

That might be *maintained (4).

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(Lord CAMPBELL, Ch. J., referred to *Young v. Grote* (5).)

LORD CAMPBELL, Ch. J. :

I am of opinion that this rule ought to be discharged. The case of the defendants is clearly untenable unless this paper can be brought within sect. 1 of the Carriers Act, 11 Geo. IV. & 1 Will. IV. c. 68. It must be shown to be a bill, order, note or security for payment of money, or writing, of such value as to make up, with the 9l. 10s., more than 10l. It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer; that Cruttenden should become liable generally to the bearer was quite contrary to his intention. Nor is it a security for money; for we must look at the time of the delivery to the carrier; and at that time nothing could

(1) 24 R. R. 325 (5 B. & Ald. 204).

(4) See *contra*, *Awde v. Dixon*, 86

(2) 42 R. R. 651 (2 Bing. N. C. R. R. 527 (6 Ex. 869).

544).

(5) 29 R. R. 552 (4 Bing. 253).

(3) 1 Burr. 452.

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be claimed on it. I think it is a writing ; it would be very difficult to define a writing so as not to include this paper. Then the question is as to the value. If this writing possess any value beyond that of the paper material, that value must be 11l. 10s. Now can it be said that the writing bore that value at the time of its delivery to the carrier? I do not see that it was of intrinsic value to any person. It empowered a particular individual to claim to that amount, by putting his name to it ; but that had not been in fact done by the individual, Goold. I cannot agree that the executors of Goold could have made it valuable by putting to it his name, or their own, or any name whatever. Nor could any one have bestowed value on it, who, not being contemplated by Cruttenden, had found it. It is therefore in entire accordance
[*558] *with all the authorities, to hold that this writing was of no value at the time of its delivery to the carrier.

WIGHTMAN, J. :

The question is, whether that which beyond all doubt was a writing was, at the time of its delivery to the carrier, of a value exceeding 10l. The fallacy of the argument lies in attempting to make the power of conferring the value at the end of the destined carriage the criterion of the value at the time of the delivery. I think the rule should be discharged.

ERLE, J. :

I am of the same opinion. This being an imperfect instrument, and not a complete bill, order, note or security for money, but clearly a writing, we are not bound to say that, in point of law, it was of value. I use that expression, because it may be that, this being, except for the absence of the name of the drawer, an accepted bill of exchange, a jury may in a similar case find that the writing is of value ; and I do not wish to preclude myself from considering whether such a finding might not be sustained.

CROMPTON, J. :

I am of the same opinion ; and I have no remarks to add.

Rule discharged.

HARRIS v. CARTER.

(3 EL. & BL. 559—562; S. C. 2 C. L. R. 1582; 23 L. J. Q. B. 295; 18 Jur. 1014; 2 W. R. 409; 23 L. T. O. S. 66.)

1854.
April 24.

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Plaintiff, a sailor, signed articles, for a voyage out to M. and home, at 3*l.* per month. On the arrival of the ship at M. several of the crew deserted. The captain, to induce the rest to remain, signed fresh articles with plaintiff and others at the rate of 6*l.* per month for the home voyage. Plaintiff continued in the vessel till her arrival home, and then sued the shipowner for work and labour. Defendant paid money into Court at the rate of 3*l.* per month. Plaintiff claimed to be paid at the rate of 6*l.* for the home voyage. On the trial, there was some evidence that at M. the captain had consented to the discharge of some of the crew. The Judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the Judge directed a nonsuit:

Held, on a motion for a rule for a new trial, that the nonsuit was right; for that there was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorize the captain to bind the owners by such a contract.

COUNTS for work and labour, and on accounts stated. Pleas: 1. Except as to 39*l.*, Never indebted. 2. As to 39*l.*, Payment into Court. The plaintiff took issue on the first plea, and took the money out of Court on the second.

On the trial, before Platt, B., at the last Liverpool Assizes, it appeared that the plaintiff was a sailor, and that his claim was against the defendants, as owners of the ship *Monteagle*, for wages on a voyage out to Melbourne and home. Before sailing, the plaintiff signed articles by which he agreed for the voyage, out and home, at 3*l.* per month. The defendants had paid money into Court at that rate for the whole voyage: the plaintiff claimed to be paid at the rate of 6*l.* per month for the homeward voyage. It appeared that, on the arrival of the vessel at Melbourne, many of the crew deserted: the captain, to induce the others to stay, promised to pay 6*l.* per month on the home voyage, and signed fresh articles with the plaintiff and the rest of the remaining crew to that effect. After this, more of the crew deserted; the captain had some of them put in prison; *but, being unable to get fresh hands, he finally agreed with four of the deserters to take them out of prison, and pay them high wages, and discharge them at Bombay, if they would work the vessel so far home as that port. This was accordingly done; and these men were discharged at Bombay. The plaintiff served on the whole voyage home till the vessel arrived safe in London.

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On the proof of these facts the learned Judge declared his opinion

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to be that there was no evidence to go to the jury in support of the plaintiff's claim. The plaintiff's counsel urged that there was evidence that the captain had, at Melbourne, consented to the discharge of some of the crew, and had thereby improperly increased the labours of the plaintiff and those who remained and did their duty; which, they contended, might form a consideration for a fresh promise. The learned Judge refused to leave any question to the jury, except as to whether the plaintiff himself had been discharged before the fresh contract. The jury having answered in the negative, his Lordship directed a nonsuit, with leave to move to enter a verdict.

C. Milward now moved to enter a verdict pursuant to the leave reserved, or for a new trial on the ground of misdirection:

The nonsuit proceeded on the authority of *Stilk v. Myrick* (1): but there Lord ELLENBOROUGH says: "If they" (the crew in that case) "had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty *upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages."

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(LORD CAMPBELL, Ch. J.: If anything had occurred to relieve the plaintiff from the engagement he contracted when he signed the articles in this country, he might enter into a fresh contract. What is it that, as you say, set him free?)

There was evidence that the captain discharged at least one of the seamen at Melbourne: that should have been left to the jury.

(WIGHTMAN, J.: Do you contend that, whenever the captain on a foreign voyage discharges one of the crew, improperly if you will, all the rest are at liberty to leave the ship?)

Perhaps not: but, if there could be any improper discharge of any portion of the crew which would set the remainder free, there was some evidence here of their being set free. It is plain, from the high pay given to the deserters who went on to Bombay, that the

vessel was short-handed, and the labour of the plaintiff and those who did their duty greatly increased.

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LORD CAMPBELL, Ch. J. :

I am of opinion that the nonsuit was most properly entered, and ought not to be disturbed. Had the plaintiff been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and, under some circumstances, the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there, for instance, been an entire change of the voyage it might have been so. But here there were no circumstances of that kind. The voyage remained the same voyage for *which the men had shipped; there was no consideration for a promise to the plaintiff; and the captain had no authority to bind the owners. The whole foundation for the new contract was the desertion at Melbourne. We need not consider what happened afterwards at Bombay; for that could not affect the contract made at Melbourne. Now nothing which happened at Melbourne could set the plaintiff free, or be any consideration for a fresh promise.

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I cannot altogether agree with Lord ELLENBOROUGH, in *Stilk v. Myrick* ⁽¹⁾, in discarding the ground of public policy on which Lord KENYON relied in *Harris v. Watson* ⁽²⁾; for I think it would be most mischievous to commerce, if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for. There will be no rule.

WIGHTMAN, J. concurred.

ERLE, J. concurred.

CROMPTON, J. :

I should be very sorry to let it be supposed that there was the least doubt in this case.

Milward took nothing by his motion.

(1) 11 R. R. 717 (2 Camp. 317). (2) 3 R. R. 654 (1 Peake's N. P. C. 72).

WILMOT *v.* ROSE (1).

1854.
 April 25.
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(3 EL. & BL. 563—571; S. C. 2 C. L. R. 677; 23 L. J. Q. B. 281; 18 Jur. 518;
 2 W. R. 378; 23 L. T. O. S. 76.)

Sect. 11 of the Act "To regulate the sale of farming stock taken in execution," 56 Geo. III. c. 50, enacts that no assignee of any bankrupt or insolvent debtor's estate, or under any bill of sale, nor any purchaser of the goods, chattels, stock or crop of any person employed in husbandry, on lands let to farm, shall use or dispose of any produce of such land in any other manner, and for any other purpose, than such bankrupt, insolvent, or other person so employed in husbandry, ought to have used or disposed of the same if there had been no bankruptcy, assignment or sale made:

Held, that this prohibition as to purchasers is not confined to purchasers under an execution.

THIS was an action brought in the County Court of Derbyshire holden at Derby, to recover 25*l.* The plaint was as follows.

"Sir Robert Edward Wilmot, of" &c., "baronet, complains of Joseph Rose, of" &c.: "For that the said Joseph Rose, having become or being the purchaser of a crop of wheat of one Thomas Rose, a person engaged in husbandry, on lands situate in" &c., "belonging to the said Sir R. E. Wilmot, and by him let to farm to the said Thomas Rose, he the said Joseph Rose, on the 17th day of September, 1853, and at divers other times between" &c., "did unlawfully take, use and dispose of the straw and other produce of the said lands, contrary to the manner, and for other than the purpose, in or for which the said Thomas Rose ought to have taken, used or disposed of the same if no assignment thereof had been executed or sale thereof made, contrary to the form of the statute" &c.: "whereby the said Sir R. E. Wilmot has sustained damage" &c.

The cause came on for trial before the Judge of the said court and a jury, on 25th October, 1853. On the trial, the following facts were proved in evidence.

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By an agreement, under the hands of the plaintiff *and Thomas Rose, dated 26th March, 1852, plaintiff had demised and let to farm to Thomas Rose, at the rent of 59*l.* 15*s.* 4*d.*, a farm and lands, from 25th March then past, for one year, and so on from year to year, unless and until notice &c. The letting and renting to be upon terms and conditions, one of which, on the part of the tenant, is in the words following: "And shall not be at liberty, at any time during the continuance of this agreement, to sell, take or carry away, or otherwise dispose of, any hay, straw, fodder, vegetable

(1) *Dist. Hawkins v. Walrond* (1876) to, *Lybbe v. Hart* (1885) 29 Ch. D. 8, 1 C. P. D. 280, 35 L. T. 210; referred 12, 54 L. J. Ch. 860, 52 L. T. 634.

crops, muck, dung, manure or compost, which shall arise or be made and produced from or upon the said premises, or any part thereof; but, from time to time, in a good and husbandlike manner, to spend, spread, use and employ, upon such part of the said premises as may be most proper to receive the same, all such muck, dung, manure and compost as aforesaid; and, at the expiration of this agreement, leave on the said premises, for the benefit of the succeeding tenant, all such hay, straw, fodder, muck, dung, manure and compost as shall have arisen or been made upon or from the said premises, or have been brought thereon, and which shall not have been eaten, consumed, spent, spread or employed on the said premises, as aforesaid, without receiving any compensation for the same, either from the landlord or succeeding tenant, except such sum or sums of money as two indifferent persons" &c. (to be chosen by the parties, and to name an umpire) "shall determine to be the fair value of the hay, straw and manure of the last year's produce to consume on the said premises:" with provision for the case of either party refusing to name a referee.

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Thomas Rose, after the execution of the lease, entered *into possession, and became and was the occupier, of the farm and lands, and, from thence, until and at the time of the sale and removal of the wheat and straw after mentioned, continued in such occupation and possession, and was, during all that time, engaged or employed in husbandry on the said farm and lands, by virtue of the said demise, and on the terms of the said lease. After the said occupation had continued as aforesaid for more than a year, that is to say on the 30th August, 1853, a sale of the goods, chattels and effects then being in and upon the said farm and lands, including the crops then growing and being in and upon the said farm and lands, was publicly advertized to take place by public auction on 5th and 6th September, 1853. On the morning of the said 6th September, and before the crops, or any part thereof, were or was put up to auction, the auctioneer was served by the agent of plaintiff, duly authorized by plaintiff, with a notice in writing, of which the following is an extract: "I am directed to inform you that the hay, straw and turnips arising from Mr. Rose's crops must be consumed on the premises, according to his agreement; and to which I refer you." Which notice was signed by the agent as such. At a subsequent part of the same 6th September, the sale by auction of the said goods, chattels and effects, including the said crops, took place in and upon the said farm and lands: and, amongst

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other things, a crop of wheat, part of the said crops so then growing and being in and upon the said farm and lands, was put up to auction; and defendant then and there was, and was duly declared to be, the highest bidder, and the purchaser thereof. The said crop of wheat was, on the day last aforesaid, *and at the said sale, sold to defendant; and defendant then and there became the purchaser thereof. On the 9th of the same month, defendant was served by the solicitors and agents of plaintiff, duly authorized &c., with a notice, from which the following is an extract: "As solicitors to Sir Robert Edward Wilmot, of " &c., "we hereby beg to give you notice that any hay, straw, fodder, vegetation crops, muck, dung, manure or compost, lately sold on the farm now or lately occupied by Mr. Thomas Rose, of " &c., "held under the said Sir R. E. Wilmot, cannot be legally removed from the said farm, but ought to be consumed thereon, according to agreement between the said Sir R. E. Wilmot and the said Thomas Rose. And, understanding that you have purchased some of such things, we hereby further give you notice not to remove any of them, or to deal therewith otherwise than by law is allowed; and that proceedings at law will be taken against you should you act contrary to this notice." Which notice was duly signed by the said solicitors as such agents.

On the 17th of the same September, defendant took the crop of wheat, including the straw thereof, then being in and upon the said farm and lands, and carried away the wheat and straw off and from the said lands, against the will of plaintiff, as defendant then well knew, and in express defiance of the remonstrances of plaintiff, who was then and there present in person, and protested to defendant against the removal, and forbade him so to remove the same, or any part thereof.

Defendant did not offer any evidence; but it appeared from the cross examination of plaintiff's witnesses that all rent due to the plaintiff, up to 29th September following the sale, had been paid in advance, *and that he had accepted a guarantee for the rent up to Lady Day, 1854.

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It was stated by plaintiff's attorney, in opening the case, that the sale of the effects took place under a mortgage made by the tenant to a creditor: but no evidence was given of this fact.

Under these circumstances, it was contended, on the part of plaintiff, that the case came within sect. 11 of stat. 56 Geo. III. c. 50. The Judge ruled and decided that, in point of law, having regard to the facts proved, the action could not be sustained:

and he thereupon nonsuited the plaintiff. From which decision the plaintiff now appealed.

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K. Macaulay, for the appellants :

The question is whether sect. 11 of stat. 56 Geo. III. c. 50, is confined to the case of sales under an execution. It enacts that no assignee of any bankrupt or insolvent's estate, "nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock or crop of any person or persons engaged or employed in husbandry, on any lands let to farm, shall take, use or dispose of any hay, straw, grass or grasses, turnips or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed or other dressings intended for such lands, and being thereon, in any other manner, and for any other purpose, than such bankrupt, insolvent debtor, or other person so employed in husbandry, ought to have taken, used or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made." This is in terms applicable to all purchases. It is true that the title of the statute is "An Act to regulate the sale of farming stock taken *in execution."

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(LORD CAMPBELL, Ch. J.: The title of a statute, 27 Geo. III. c. 44, was relied upon in *Free v. Burgoyne* (1).)

The first ten sections of stat. 56 Geo. III. c. 50, certainly relate to crops and produce in the hands of the sheriff. But sect. 11 relates to a different subject-matter. The sheriff could have nothing to do with the acts of the assignee of a bankrupt or insolvent. And, further, the enactment of sect. 11 is, that the purchaser may not dispose of the goods otherwise than the tenant might; but the sections relating to goods taken by the sheriff provide for agreements with the sheriff.

(LORD CAMPBELL, Ch. J.: Is sect. 11 confined to crops growing on the farm?)

There may be ground for so holding; but the question is not important in this case.

Manisty, contra :

Sect. 11 must be read with the preceding sections. Sect. 1

(1) 5 B. & C. 400.

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prohibits the sheriff, after notice, from carrying off, or selling for the purpose of being carried off, the farm any straw &c., the produce of the farm, which, by agreement, ought not to be taken off; but, by sect. 3, he may sell it upon the purchaser agreeing to expend it as, by custom or agreement, it might be expended. Now, had the enactments stopped there, they might possibly be understood as, by implication, prohibiting the purchaser from carrying away the produce; but it was, apparently, not thought safe to leave this to implication; and, accordingly, sect. 11 contains an express prohibition; and this section, further, enables the purchaser to enter upon the farm and there expend the produce, which otherwise he could not do without committing a trespass.

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(CROMPTON, J.: It looks as if the Legislature, after providing for produce taken by the sheriff, thought it necessary to add provisions for produce taken by assignees of any kind.)

Had that been so, the enactments would have been similar. If the construction on the other side be correct, a purchaser, by sample, in the market, of growing crops would not be safe. In *Ridgway v. Lord Strafford* (1) a landlord was held liable to his tenant in damages for selling distrained hay and manure, subject to the condition of its being consumed on the farm, as by the lease between the two it ought to have been; the consequence was that, owing to the sale having been subjected to this condition, the articles sold realized less than their full price. Now, had sect. 11 been general, it would have protected this sale, inasmuch as an unconditional sale would have been illegal.

(CROMPTON, J.: That section does not appear to have been brought before the Court.)

The statute was under discussion; sect. 11 can hardly have escaped notice.

(LORD CAMPBELL, Ch. J.: How do you get rid of the words "any" bill of sale, and "any" purchaser.)

They are meant to extend the provision to any sale whatever of produce taken in execution.

(1) 86 R. E. 347 (6 Ex. 404).

(ERLE, J.: That is provided for before.)

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Not as to the acts of purchasers.

LORD CAMPBELL, Ch. J.:

I think the nonsuit was wrong. It proceeded on the ground that sect. 11 is confined to purchasers of what has been taken in execution. I think it is not so confined. The title and preamble do indeed contemplate only sales under execution: and, if the words of sect. 11 admitted of any reasonable doubt, we *would look to the title and preamble, and endeavour to construe the enactments consistently with them. This mode of construing a statute has been resorted to in the case of the statute limiting the time for commencing suits in Ecclesiastical Courts (1). But, though the Act now before us is a bad—I fear I must add, not an unfair—specimen of legislation, we cannot get rid of the words. *Mr. Manisty* would confine them to sales under any execution; but that is really varying the language of sect. 11, which must be enforced, though it goes far beyond the title and the preamble: it comprehends “any bill of sale,” and “any purchaser,” and is not even confined to purchasers, for it comprehends the assignees of bankrupts and insolvents. How then can we confine the enactment to sales under executions? I think, therefore, that the Judge was wrong in holding that the enactment was so confined. We are not bound to say that the plaintiff’s case could be made out; we say only that his case was not defeated by this objection. I cannot find that such a construction has been upheld in any previous case: *Ridgway v. Lord Strafford* (2) is not an authority on the construction of sect. 11; that section was not brought before the Court.

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ERLE, J. (3):

I also am of opinion that this nonsuit was wrong. The question is, Whether sect. 11 of stat. 56 Geo. III. c. 50, gives the plaintiff the rights for which he contends: that is, whether it prohibits the purchaser of a tenant’s crop of hay or straw on the farm from carrying it off the farm contrary to the terms of the lease. The words of the section are unqualified; they prohibit *any purchaser from using the hay, &c., otherwise than the seller could

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(1) 27 Geo. III. c. 44. See *Free v. Bargoine*, 5 B. & C. 400.

(3) *Wightman, J. had left the Court.*

(2) 86 R. R. 347 (6 Ex. 404).

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have used it. No doubt, if the section stood by itself, the prohibition must have been construed as absolute. But it is suggested that the statute professes to relate altogether to goods taken under execution; and *Mr. Manisty* goes through the preceding clauses which apply to such goods. Then he says that sect. 11 may be accounted for on this view; for that it is inserted for the purpose of preventing the purchaser of the stock, sold under an execution, from taking it off the farm, the preceding sections controlling only the acts of the sheriff. At first I thought there was weight in this argument: but I find that the supposed object is already secured by sect. 4; for the sheriff, by sect. 3, is to sell subject to the agreement between landlord and tenant or the custom; and then sect. 4 enables the landlord to recover damages, by action in the name of the sheriff, for the breach of the agreement with the sheriff. That, in effect, does prohibit the purchaser under an execution from carrying off the stock contrary to the terms of the holding. So that, unless we put upon sect. 11 the plain construction resulting from its language, we give it no operation. It prohibits the party who purchases farming stock, being on the land, from using it contrary to the terms of the letting. I may remark that this sort of purchase is peculiar; scarcely any one would make it without inquiring why the stock was sold on the land.

CROMPTON, J. :

The case is clearly within the 11th section.

Appeal allowed.

1854.
April 28.
May 3.

O'TOOLE v. BROWNE (1).

(3 EL. & BL. 572—586; S. C. 23 L. J. Q. B. 282; 18 Jur. 1113; 2 W. R. 430; 23 L. T. O. S. 111.)

O., being then possessed of personalty only, by will executed in 1849, after bequests of money and chattels, added: "all the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects, of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto" B. and T., executors of the will, "to hold to them, the said B. and T., their executors, administrators and assigns," upon trust to "sell and dispose thereof," and call in and receive all debts, "and place the moneys arising by such sale or disposal" upon Government or other security, receive the interest and dividends, and pay the same to testator's wife for life during her widowhood; and, if she died or married again, to apply the same, or a sufficient part thereof, to the maintenance of his

(1) Cited, *Dobson v. Bowness* (1868) L. R. 5 Eq. 404, 407, 37 L. J. Ch. 309.

children till they should come of age; and, when the youngest should come of age, to divide the said residue and the interest equally among the children.

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After the execution of the will, O. purchased land:

Held that, under stat. 7 Will IV. & 1 Vict. c. 26, ss. 3, 24, such land passed by the residuary clause.

EJECTMENT for dwelling-house and land in Cheshire. Defendant appeared as owner. By order of COLERIDGE, J., and by consent, the parties, without proceeding to trial, stated the facts for the opinion of this Court, upon a case which was substantially as follows.

John O'Toole, the testator after mentioned, made his will in writing, dated 10th November, 1849, duly signed and attested as required to give validity to a testamentary disposition. By the will, he gave to a sister 500*l.*; to a brother his share in a ship; to William Thompson, an executor and trustee after mentioned, 200*l.*; to Edward Francis Browne, also an executor and trustee after mentioned, 100*l.* "Also I give and bequeath unto my beloved wife, Eliza O'Toole, all my plate, linen, china, household goods and furniture. All the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects, of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto the said Edward Francis Browne, of" &c., "and "William Thompson, of" &c.: * "To hold to them, the said E. F. Browne and W. Thompson, their executors, administrators and assigns, upon this special trust and confidence nevertheless, that is to say, that they, my said trustees, or the survivor of them, do and shall, as soon as convenient after my death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as shall be due or owing to me at the time of my death, and place the moneys arising by such sale or disposal upon Government or other good and sufficient security, in their own names, and in such manner as they shall think proper; and also in trust that they do and shall receive the interest and dividends thereof, from time to time, as the same shall become payable, and pay the same unto my beloved wife, Eliza O'Toole, during her lifetime, and as long as she remains my widow; and, in case my said wife either die or marry again, then in trust that they shall pay, apply and dispose of the same aforesaid interest and dividends of such moneys, or a sufficient part thereof, for and towards the sole maintenance, education and support of my children now living, or any other child or children that my said wife may be *enceinte*

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with at the time of my death, until my said children shall severally and respectively attain their said ages of twenty-one years; and, when the youngest of my children shall have attained his or her age of twenty-one years, in trust to pay, assign, transfer and convey all the said residue of my estate and effects, with the interest, dividends and produce thereof, equally unto and amongst all my said children then living." Direction that neither trustee should be liable for losses, nor answerable except for his own acts; and that the trustees should reimburse themselves the reasonable

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*costs, &c. of executing the will and trusts. "And, lastly, I do hereby nominate, constitute and appoint my said trustees, the said E. F. Browne and W. Thompson, executors of this my will and testament."

At the time of the execution of the will, the children of the testator then living were the plaintiff James O'Toole, Mary Elizabeth O'Toole, Joseph O'Toole, and Margaret O'Toole: and there is also another child of the testator now living, viz. Mary Alice O'Toole, who was born since the date of the will.

W. Thompson, one of the executors and trustees, died on 10th October, 1852. Mr. Browne, the other executor and trustee, is the defendant hereto.

The testator died on 30th January, 1853, without having revoked or altered his will, leaving the said Eliza O'Toole, his widow, and the several children above named.

The plaintiff, James O'Toole, is the eldest son and heir-at-law of the testator.

The will was duly proved by Browne on 15th February, 1853; and he has accepted the trusts thereof.

The testator, at the time of the date and execution of his will, was not possessed of any real estate or interest in any real or chattel real property whatsoever: but, subsequently to the making of his will, he purchased in fee simple the plot of land sought to be recovered in the present action; and the same was conveyed to him by indenture bearing date 12th March, 1850, and was thereby conveyed to the ordinary uses to bar dower, for the benefit of the testator. He afterwards erected a residence on the land, with necessary offices, &c., and resided therein down to and at the time of his death.

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The question for the opinion of the Court is: Whether the plaintiff, the heir-at-law of the testator, is entitled to the premises, as not being comprised in the disposition made by the will. If the

Court shall be of opinion that the plaintiff is so entitled, judgment is to be entered for him ; otherwise for the defendant.

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The case was now argued (1).

C. Milward, for the plaintiff:

The real property did not pass under the word "estate." That word, if the will contained nothing to lead to a contrary construction, might be held to pass realty ; but the whole will indicates that the testator had no notion of bequeathing real property.

(LORD CAMPBELL, Ch. J. : Perhaps not, at the time of his executing the will. But he purchased the real property afterwards.)

That brings the question to the effect of stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 24. Sect. 3 extends the power of devising to such "real and personal estate, as the testator may be entitled to at the time of death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." Sect. 24 enacts that, as to both realty and personalty, the will shall be construed "to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." It will be contended, on the other side, that the word "estate," in a will executed after the testator had acquired the real property, would have passed such realty. But there is nothing in the statute to alter the inference as to the meaning of the words used ; and the *question must still be what was passing in the testator's mind at the time he framed the will.

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(LORD CAMPBELL, Ch. J. : Surely that cannot be the canon now.)

The whole will must still be looked to. The word "estate" occurs together with words indicative only of personalty. In *Doe d. Haw v. Earles* (2) it was held that the words "all my effects," and "other effects at this time in my possession, or that hereafter become my property," did not pass a remainder in fee, where the words were used in the will in connection with other words applicable merely to personal property. In *D'Almaine v. Moseley* (3) KINDERSLEY, V.-C., held the particular words, in the will there under discussion, not to be sufficient to control the effect of the

(1) Before Lord Campbell, Ch. J.,
Wightman, Erle, and Crompton, JJ.

(2) 71 B. R. 723 (15 M. & W. 450).
(3) 94 R. R. 782 (1 Drew. 629).

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words "residue of my estate and effects." The enactment in sect. 24 is controlled by the words "unless a contrary intention shall appear by the will." There is nothing here to show that the testator intended to dispose of all that he possessed.

(LORD CAMPBELL, Ch. J.: He did dispose of all that he possessed at the time of his making the will.)

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He laid out money afterwards in the purchase of land. * * It is to be observed, further, that here the word "devise," which properly appertains to realty, does not occur: the words are "give and bequeath," which are correctly applicable to personalty only. The gift is to the executors, *habendum* to them, their "executors, administrators and assigns;" and this, though not a circumstance sufficient to justify a contravention of an intent clearly appearing elsewhere, is at any rate of importance as an element in ascertaining the intent.

(LORD CAMPBELL, Ch. J.: But observe: the executors are to sell; and there is no beneficial interest given to them.

WIGHTMAN, J.: Must we not understand the testator as intending to dispose of all he should have at the time of his death?)

All of a certain character.

(WIGHTMAN, J.: Suppose he had used the words "all the estate and effects I shall be possessed of at the time of my death:" and does not the statute incorporate the effect of such words?)

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In *Doe d. Bunny v. Rout* (1) the bequest was, to the sole executrix, of "all my stock in trade, household goods, wearing apparel, ready moneys, securities for money, and every other thing, my property, of what nature or kind soever, to and for her proper use and disposal," subject to debts and funeral expenses: this was held not to pass land. The judgment there reviews many of the preceding cases; *but it does not notice a very important one, *Doe d. Spearing v. Buckner* (2), where the introductory words of the bequest were "as to my estate and effects both real and personal;" and then, after some bequests of personalty, the will proceeded thus: "and also all the rest, residue and remainder of my estate and effects of any and what nature or kind soever or wheresoever, I give and

(1) 17 R. R. 448 (7 Taunt. 79).

(2) 3 R. R. 278 (6 T. R. 610).

bequeath the same" to C. B. and J. R., "their executors or administrators in trust and that they shall from time to time add the interest thereof to the principal, so as to accumulate" &c., going on to direct how "the said residue" should be paid: and this was held not sufficient to disinherit the heir. * * *

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Mellish, contra:

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The word "estate" *primâ facie* includes land.

(LORD CAMPBELL, Ch. J.: You need not argue that point.)

Then the burthen of argument is on the party seeking to control the effect of the word. The leading case now must be considered to be *The Mayor of Hamilton v. Hodsdon* (1). There the early cases, upon which most reliance has been placed on the *other side, are treated as no longer law. Nothing in this will suggests an intention which can control the expression. * * It is argued that the word "estate" occurs in juxta-position with words relating to personalty: but the fair interpretation is that the word "estate" was added in order to make that a general devise which otherwise might have been restricted to personalty: *Tilley v. Simpson* (2), *Jongsma v. Jongsma* (3), which are the two cases acted on in *Doe d. Evans v. Evans* (4), where this principle was the ground of the decision.

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(LORD CAMPBELL, Ch. J.: Certainly that ground of decision is emphatically disclosed in the judgment.)

The judgment is, it is true, brief; but the reason of that is that the principle was supposed to be incontrovertibly settled. There is more weight in the circumstance of the *habendum* here being to the executors, their executors and administrators.

(LORD CAMPBELL, Ch. J.: That would be a very strong argument against you, if the interest devised were beneficial: but here it is only a devise in trust for sale.)

That is the answer. * * But, further, it may be argued that the Legislature meant, by the provisions of stat. 7 Will. IV. & 1 Vict. c. 26, to do away with the distinction between personalty and realty. Before that statute, after acquired personalty passed by will: now sects. 3 and 24 put after acquired realty on the same footing.

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(1) 79 R. R. 1 (6 Moo. P. C. C. 76).

(3) 1 Cox, 362.

(2) 1 R. R. 577, n. (2 T. R. 659, n.).

(4) 48 R. R. 657 (9 Ad. & El. 719).

O'TOOLE *c.* *D'Almaine v. Moseley* (1) resembles this case very closely; and the judgment there furnishes an answer to most of the argument on the other side. There was in that case a distinction between the different trusts, which is not to be found here, and which might to a certain extent have suggested an argument that the realty and personalty were not comprehended in the same general intention. In *Saumarez v. Saumarez* (2) realty was held to pass by the words "residue of the property which I may leave at my death." * * *

[582] *C. Milward*, in reply. * * *

Cur. adv. vult.

[583] LORD CAMPBELL, Ch. J., on a later day in this Term delivered the judgment of the COURT :

We are of opinion that, under the Wills Act, 7 Will. IV. & 1 Vict. c. 26, the defendant is entitled to our judgment.

We consider it right to observe, however, that his counsel in the argument attempted to ascribe an operation to this Act which we do not think it was intended to have, in contending that its policy was to destroy the distinction between real and personal property. Looking to the language employed by the Legislature, we think that, unless where the statute contains an express enactment to alter the effect of words in a will, they are still to have exactly the same operation as before the Act passed.

In this case, we are to regard only the 24th section of the Act, which enacts "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." We are, therefore, to consider what would be the proper construction of the will of John O'Toole, assuming it to be executed immediately before his death, and whether, regard being had to the time when it was executed, any thing appears in the will showing that by this construction the intention of the testator would be contravened.

Before the Wills Act passed, if the testator, at the time of making his will, had been seized in fee simple of the land sought to be recovered in this ejectment, would the land have passed by the will? We are of opinion that it would. The rule is well settled by *Doe* *d. *Evans v. Evans* (3), *The Mayor of Hamilton v. Hodsdon* (4), and a

(1) 94 R. R. 782 (1 Drew. 629).

(3) 48 R. R. 657 (9 Ad. & El. 719).

(2) 48 R. R. 116 (4 My. & Cr. 331).

(4) 79 R. R. 1 (6 Moo. P. C. C. 76).

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long train of decisions, which it is unnecessary to enumerate, that the word "estate" in a will is sufficient to carry real as well as personal estate, and that this force is to be given to it unless something appears upon the will to show that it was used in a less extensive signification. Here the testator, after leaving several legacies, pecuniary and specific, uses these words: "all the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto the said Edward Francis Browne" "and William Thompson," "to hold to them," "their executors, administrators and assigns, upon this special trust and confidence" &c.; the trusts being all such as would be applicable to real as well as personal estate. Although there be no introductory words intimating expressly an intention to dispose of the whole of his property real and personal, is there any thing to show that he meant to die intestate as to real estate, if he had any?

Reliance was placed upon the absence of the word "devise," which is technically applicable to real estate: but the words "give and bequeath" are quite sufficient.

More stress was placed upon the residuary clause beginning the enumeration of the property to be disposed of with "goods, chattels, stock in trade;" the argument being that the general words which follow must be confined to property *ejusdem generis*. But, according to the current of authorities, the effect of the word "estate" is not restrained merely by this collocation; *and any presumption that the general words are used in a restricted sense is rebutted by the words which follow, "of what nature or kind soever, not hereinbefore given or bequeathed."

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The only other circumstance relied upon for the heir-at-law was, that the limitation is to Browne and Thompson, "their executors, administrators and assigns." Some weight might have been given to this objection, if the intention had been that Browne and Thompson were to take a beneficial interest in the subject-matter left to them; for real estate could not by such a limitation vest in executors. But Browne and Thompson are mere trustees to sell and divide the proceeds among the different objects of the testator's bounty: and, to empower them to do this with respect to real estate, the words of the will are amply sufficient.

It may be further observed that the trusts of the will indicate an intention that no preference was to be given to the testator's eldest son, and that all his children were to be put upon equal footing in

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the division of his property. Supposing that he had been seized of real estate when he made his will, there appear to be words in the will indicating a clear intention that his eldest son should not inherit it, but should only take an equal portion of the proceeds with the other children.

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Out of respect to the Court of Exchequer, we ought to say that we have not overlooked their decision in *Sanderson v. Dobson* (1). But the LORD CHIEF BARON, in delivering the judgment of the Court, says: "The ground on which we mainly rely is, that from the context it appears certain that the word 'estate' was not *meant to include all the personal estate, and therefore the principle on which the word is held to include real property, namely, the absolute generality of the expression, fails." That *ratio decidendi* would not apply in the present case, in which the words of the will are admitted to be sufficient to carry the whole of the personalty. At any rate, the effect of that decision must be considered as neutralized by the subsequent unanimous decision of the Court of Common Pleas on the same will (2), holding that the real estate passed by it.

Such being the right construction of the will, supposing the will to have been executed immediately before the death of the testator, nothing has been pointed out to us, or can be found as appearing by the will, to show a contrary intention, regard being had to the fact that in truth the will was executed on the 10th of November, 1849, when the testator had not purchased the land sought to be recovered.

We are therefore bound to give judgment for the defendant.

Judgment for defendant.

1854.
April 29.
May 3.

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(3 EL. & BL. 587—595; S. C. 23 L. J. M. C. 129; 18 JUR. 533; 2 W. R. 427;
23 L. T. O. S. 142.)

Two justices made an order for the removal of a pauper, and in the warrant stated that the pauper had not "become chargeable" to the removing parish "in respect of relief made necessary by sickness or accident." On appeal, the Sessions confirmed the order, subject to a case stating (amongst other things) that the pauper was afflicted with incurable blindness, which was the original and continuing cause of his chargeability:

Held: that blindness was sickness within the meaning of the Poor

(1) 1 Ex. 141.

(2) *Sanderson v. Dobson*, 78 R. R. 596 (7 C. B. 81).

Removal Act, 1846 (9 & 10 Vict. c. 66), s. 4; and that, the justices not having stated in the warrant that they were satisfied that the sickness would produce permanent disability, the warrant was bad. And this Court quashed the order accordingly.

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On appeal against an order of two justices for the removal of Richard Watts and Elizabeth his wife, with their three children, from the parish of Knighton in Radnorshire, to the parish of Bucknell in Shropshire, the Sessions confirmed the order, subject to a case.

The case set out the order of removal. The only part, the words of which are material to the points discussed, was the recital of the complaint that the paupers, being inhabiting in the parish of Knighton, "have become and are now actually chargeable thereto, and now receiving relief therefrom, not having resided in the said parish for five years next before the application for this warrant of removal, and not having gained a legal settlement there, nor having produced any certificate acknowledging them to be settled elsewhere, and not having become chargeable thereto in respect of relief made necessary by sickness or accident. We upon due proof of the premises do adjudge the same to be true." The case then set out a copy of the notice of chargeability and grounds of removal, a copy of the examinations, a copy of the notice of appeal, and a copy of the grounds of appeal. Those parts of those documents material to the questions are stated sufficiently in the subsequent part of the case, which was as follows.

"The statement in writing of the grounds of removal, duly served upon the appellants with a notice of chargeability and a copy of the said order appealed against, in so far as the said statement related to the ground of settlement relied upon by the respondents, stated as follows: 'That the said pauper Richard Watts has gained a settlement in your parish of Bucknell, by one of the means stated in his examination taken by the removing magistrates, and that his settlement in your parish of Bucknell, by one of such means or otherwise, has been acknowledged, since the year 1847, by relief given to himself, his wife and children by your said parish of Bucknell, whilst he and they have been residing in that parish, and also in the parish of Knighton since the month of May, 1851.' The examination referred to in the grounds of removal, or a copy of it, was not sent with the order and grounds of removal to the appellants; but a copy of the examination was applied for, and sent to and received by the appellants on the 29th day of April, 1853. The examination stated that the said Richard Watts was 48 years of

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age, and was born, as he had heard and believed, at Watts's old house in the said parish of Bucknell in the county of Salop. It also stated a hiring and service, in the said parish of Bucknell, by the said Richard Watts, when about 15 years of age, so as, if proved, to confer a settlement; and it also stated certain relief given by the appellants to the pauper, whilst he was residing in the respondent's parish.

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"The respondents at the hearing proved a birth settlement of the pauper Richard Watts in the appellant parish: and thereupon it was objected, on the part of the appellants, that, as the statement in writing of the grounds of removal did not in any way set forth the *settlement relied upon, as required by stat. 11 & 12 Vict. c. 31, sects. 1 and 2, the respondents could not legally go into evidence of such settlement. The Court of Quarter Sessions was of opinion that the statement of the grounds of removal was to be read as incorporating the examination of the said Richard Watts: and the examination was read accordingly.

"The respondents then proved that, since the month of May, 1851, and down to the 30th December, 1852, the said Richard Watts had from time to time received relief from the appellant parish, the said Richard Watts during all the said time being resident out of the appellant parish, and in the respondent parish; and the respondents relied upon this as evidence of the admission of the pauper's settlement in the appellant parish. This was the case for the respondents.

"The appellants in answer claimed to be allowed to prove that the said relief given by their parish had been given in error, and, under a mistaken belief as to the settlement of the said Richard Watts, and that the said Richard Watts had not gained a birth settlement in their parish, the father of the said Richard Watts having, at the time of the birth of the said Richard Watts, acquired a settlement in the parish of Brampton Brian in the county of Hereford, by reason of a hiring and service. The respondents objected to the appellants giving such evidence, as the statement of grounds of appeal, served upon the respondents, did not mention such settlement by hiring and service as one of the grounds of appeal. The appellants rested their right to give such evidence on their 4th ground of appeal, which was as follows: 'That, if any relief has been given to the said paupers by our said parish, it was given in error, and under a *mistaken belief as to the place of settlement of the said paupers, and that the said paupers have

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never acquired a settlement, and are not settled in our said parish.' The Court of Quarter Sessions was of opinion that the objection was valid, and refused to allow the appellants to give such evidence.

"The appellants proved that the pauper had been afflicted with incurable blindness, which was the original and continuing cause of his chargeability since the month of August, 1847; and contended that the blindness of the said Richard Watts was to be considered 'sickness or accident' within stat. 9 & 10 Vict. c. 66, s. 4; and therefore that the said order ought to have stated that the justices, granting the same, were satisfied that such sickness or accident would produce permanent disability.

"The respondents on the other hand contended that, as the order negatived the chargeability to have been caused from sickness or accident, and as there was no proof that any such sickness or accident existed, further than the incurable blindness of the pauper since 1847, the appellant's objection could not be sustained.

"The Court of Quarter Sessions decided against the objection.

"If the Court of Queen's Bench shall be of opinion that the respondents ought not to have been allowed to go into the evidence given, either of the birth settlement of the pauper in the appellant parish, or of the settlement by relief given by the appellants, or that the blindness of the said Richard Watts was sickness or accident within stat. 9 & 10 Vict. c. 66, s. 4, and the order appealed against therefore bad for omitting to state that the justices granting the same were satisfied that *such sickness or accident would produce permanent disability; then the said order and the order of Sessions confirming the same are to be quashed: but, if otherwise, then the said orders are to be confirmed.

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"And, if the Court shall be of opinion that the appellants, under their grounds of appeal, were entitled to go into evidence of the settlement of the pauper's father in a third parish to show that the relief proved to have been given by their parish had been given in error and under a mistaken belief as to the settlement of the said Richard Watts, then the appeal is to be sent back to the Sessions in order that such evidence may be heard and determined upon: but, if otherwise, then the said orders are to be confirmed."

The case was now argued (1).

(1) Before Lord Campbell, Ch. J., and Wightman, J. Erle and Crompton, JJ. were in the Court of Criminal Appeal.

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Skinner, in support of the order of Sessions :

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The first point arises on the sufficiency of the grounds of removal, sent with the notice of chargeability pursuant to stat. 11 & 12 Vict. c. 31, s. 2; and the objection made is that these grounds refer to the examinations. There is no reason why they should not incorporate the examinations; but, in the present case, the grounds of removal also state relief by the appellant parish, which is a sufficient *prima facie* case. Then the objection is made that the order is bad for not complying with stat. 9 & 10 Vict. c. 66, s. 4, which enacts "that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that *the sickness or accident will produce permanent disability." Now this objection is not raised in fact: the justices, by the wording of their order, show that they decided that the relief was not made necessary by sickness; and that might well be, for blindness is not necessarily sickness; nor does it necessarily incapacitate a man from earning his livelihood.

Scotland, contra :

The very object of stat. 11 & 12 Vict. c. 31, ss. 1, 2, was to substitute the notice of grounds of removal for the examinations.

(LORD CAMPBELL, Ch. J.: But may they not be incorporated? *Verba relata in esse videntur*.)

That might have been, if the examination had been sent along with the grounds of removal; but it was not.

(WIGHTMAN, J.: If the respondents were entitled to go into proof of the relief given by the appellant parish, it is sufficient to make us answer the first question submitted to us in their favour.)

Then the order is bad, as it does not state that the justices were satisfied that the disability would be permanent. The Sessions find as a fact "that incurable blindness" "was the original and continuing cause" of the pauper's chargeability: but they cannot find that the justices who made the order of removal were then satisfied that the blindness was incurable, or the disability permanent. The justices in the warrant say the chargeability was not

occasioned by sickness. Supposing them to be ignorant that the pauper had been sick: still, if such was the fact, the warrant is bad: *Reg. v. Prior's Hardwick* (1). Then, is not blindness sickness within the meaning of stat. 9 & 10 Vict. c. 66, s. 4? *The object of the Act was to protect persons incapacitated by any disease, whether chronic or not, from being removed, unless the disease was likely to produce permanent disability. * * *

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Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a subsequent day in this Term (May 3), delivered judgment:

The first point arising in this case we clearly think ought to be decided in favour of the respondents. They having stated on the face of their grounds of removal (without referring to the examination of the pauper), as one of the grounds, "relief given to the pauper by the appellant parish while residing in the respondent parish," they were at liberty to make a *prima facie* case of a settlement in the appellant parish, by proving this relief, even if not entitled to prove a birth settlement in the appellant parish; and the proof of the birth settlement, if improperly admitted, did not prejudice the respondents.

We further think that the proof of this birth settlement was properly admitted to disprove the allegation of the appellants that the relief had been given by mistake.

But the second and more important point we think must be determined in favour of the appellants. This turns on the 4th section of stat. 9 & 10 Vict. c. 66, which enacts "that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief *made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability."

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In the present case, the order of removal negatives the fact of the paupers "having become chargeable" "in respect of relief made necessary by sickness or accident," and, of course, contains no statement "that the sickness or accident will produce permanent disability." The want of this statement being one of the grounds of appeal, the appellants proved that the pauper, who was the father of the family removed, "had been afflicted with incurable blindness,

(1) 12 Q. B. 168.

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which was the original and continuing cause of his chargeability since the month of August, 1847."

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The question arises, Whether this be a case in which the pauper is to be considered a person becoming chargeable in respect of relief made necessary by sickness? In *Reg. v. Prior's Hardwick* (1) PATTESON, J. says: "The object of this enactment was to protect the pauper: that a person becoming chargeable by a merely temporary sickness should not be removed." And the COURT held that an order of removal was bad for omitting this statement, although the fact of sickness was never brought before the removing justices. The cause of chargeability being a fact to be inquired into on appeal, we are to say whether in this case the proof was not sufficient that the chargeability did arise from sickness. There would probably have been no difficulty in coming to the conclusion that the sickness would produce permanent disability: and we do not understand why advantage was *not taken of the 6th section of stat. 11 & 12 Vict. c. 31, by having the order of removal amended at the Sessions by supplying the omission. But we are called upon to say whether, upon the evidence at the Sessions, the objection to the order ought to have been sustained. And we are of opinion that incurable blindness is sickness within the meaning of stat. 9 & 10 Vict. c. 66, s. 4. It seems impossible to give any definition of sickness which will not include blindness. A disease which is incurable or mortal is not the less sickness. Blindness may be incurable, without necessarily producing permanent disability to earn a livelihood; and a man, though incurably blind, might be oppressively removed contrary to the intentions of the statute. There can be little doubt that in this case the blindness did produce permanent disability; but the order does not say so; and therefore we think that it is bad. Consequently the order of removal, and the order of Sessions confirming it, must be quashed; and it becomes unnecessary to consider the validity of the last objection of the appellants, that they were shut out from proving that the pauper had a derivative settlement in a third parish.

Rule absolute for quashing order of justices and order of Sessions.

(1) 12 Q. B. 168.

REG. v. INHABITANTS OF EAST STONEHOUSE (1).

(3 EL. & BL. 596—599; S. C. 23 L. J. M. C. 137; 18 Jur. 446; 2 W. R. 410; 23 L. T. O. S. 77.)

1854.
April 29.
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The wife and children of a private marine had resided five years in the parish of S. The husband had not so resided. The husband being absent on her Majesty's service, the wife and children were removed to the parish of C. On appeal, the Sessions quashed the order, subject to a case stating the above facts, on the ground that the wife and children were irremovable:

Held, that the wife and children might be removed notwithstanding the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), and the Poor Removal Act, 1848 (11 & 12 Vict. c. 111), though the husband, if present, could not have been removed in consequence of his being a marine; inasmuch as the proviso in that latter statute only prohibits the removal of the wife or children of a person who had acquired the status of irremovability under the Poor Removal Act, 1846.

ON appeal to the Quarter Sessions for Devonshire, against an order of two justices, dated 29th July, 1853, for the removal of Jane Warne, the wife of George Warne, a private in the Royal Marines, then absent from her, and her five infant children, from the parish of East Stonehouse in Devonshire to the parish of Charles the Martyr in the borough of Plymouth, the Sessions quashed the order, subject to the following case.

The said George Warne, the husband of the said Jane Warne and the father of her said children, enlisted as a private in the Royal Marines in September, 1841, and has, ever since that time, continued in her Majesty's service as a private of marines. He married his said wife in December, 1846, at Stonehouse, where his wife then resided, and where she has ever since resided; and her said children have resided there with her since their respective births. At different times after his marriage, and down to 27th January, 1848, the said George Warne, still being a marine, was quartered in barracks in Stonehouse. From 27th January, 1848, to 31st December, 1851, the said George Warne was serving on board the guard ships in the harbour of Plymouth, and out of the parish *of Stonehouse; and, during that time, he frequently slept with his wife in Stonehouse. The Court of Quarter Sessions were of opinion that the paupers were respectively irremovable.

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If the Court of Queen's Bench shall be of opinion that the said paupers were irremovable at the time of the date of the said order, the same is to be and remain quashed. But, if the said Court shall be of opinion that they were removable, the same is to be and stand confirmed.

(1) Cited, *Reg. v. Kingston Guardians* (1869) 21 L. T. 488, 490.

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Rowe, in support of the order of Sessions:

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Stat. 9 & 10 Vict. c. 66, s. 1, enacts that no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant. Had the enactment stopped there, the woman in the present case would have been irremovable: but the section contains a proviso: "that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." This proviso was construed as meaning that, when the husband, if present, would be removeable, but was absent, the wife and children might be removed: *Reg. v. St. Ebbe's* (1). Then stat. 11 & 12 Vict. c. 111, recites stat. 9 & 10 Vict. c. 66, s. 1, repeals the proviso, and enacts, instead of it: "that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place *from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act." The husband here, being a marine, could not have been removed from this parish.

Karslake, contra :

There had been no irremovability acquired by the husband under stat. 9 & 10 Vict. c. 66; for he had never resided in the parish for five years. The proviso, being on an enactment, must be construed with reference to that enactment; and, that being so, irremovability in the proviso means the status of irremovability from a particular place or parish, acquired under the enactment. It is true that, so long as the husband continues in the Queen's service, he cannot be removed from any place; and it is also true that, if husband and wife be living together, you may not remove the wife alone so as to break the *consortium*. But that objection does not arise here; as the husband is absent. It would be clear, if it stood on the proviso in stat. 8 & 9 Vict. c. 66, that "not removeable" meant having acquired the status under the Act: but the language of the amended proviso in stat. 11 & 12 Vict. c. 111, puts it beyond all doubt.

LORD CAMPBELL, Ch. J. :

I think it is clear that the meaning of the proviso is, that the wife and children shall not be removeable when the husband has acquired the status of irremoveability under the Act. Here it can in no sense be said that the husband would not be removeable by reason of any provision in the Act.

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HOUSE.

WIGHTMAN, J. :

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The first proviso is so worded as to leave it open to doubt whether it might not apply to irremoveability on any ground; but the proviso in the second Act puts an end to all doubt (1).

Order of Sessions quashed.

REG. v. TRUSTEES OF SOUTH SHIELDS TURNPIKE ROADS.

1854.
April 29.

(3 EL. & BL. 599—607; S. C. 23 L. J. M. C. 134; 18 Jur. 1115.)

[The only points involved in this case were the construction and effect of the expired statute 4 & 5 Vict. c. 59.]

RE BAILEY (2).

(3 EL. & BL. 607—622; S. C. 23 L. J. M. C. 161; 18 Jur. 930.)

1854.
May 1.

[607]

The return to a *habeas corpus ad subjiciendum*, to bring up B., assigned, as the cause of B.'s detention, a warrant by a justice, which recited, in the past tense, that "B. was" this day "convicted before me" of an offence against stat. 4 Geo. IV. c. 34 (3), "and I, the same justice, adjudged" that B. should be committed for two months with hard labour; and the warrant then, in the present tense, commanded the constables to take and the gaoler to receive B. The warrant did not set forth the evidence, nor state that it was taken in the prisoner's presence, or on oath:

Held that, under stat. 4 Geo. IV. c. 34 (3), the conviction and warrant might be in one instrument, but might also be separate; that the instrument in the present case was not a conviction, but a warrant founded on a previous conviction; and was therefore good in form.

Affidavits were used showing the evidence before the justice:

Held, that it was open to the prisoner to show, by affidavit, that there

(1) Erle, J. and Crompton, J. were on this morning in the Court of Criminal Appeal.

(2) Cited, *Buccleuch v. Metropolitan Board of Works* (1870) L. R. 5 Ex. 221, 39 L. J. Ex. 130, 23 L. T. 255;

affd. L. R. 5 H. L. 418, 41 L. J. Ex. 137, 27 L. T. 1; *In re Authers* (1889) 22 Q. B. D. 345, 350, 58 L. J. M. C. 62, 60 L. T. 454.

(3) Repealed: 38 & 39 Vict. c. 86, s. 17.

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was no evidence from which the justice might reasonably draw an inference that the relation of master and servant existed between prisoner and his employer, as that would show that the justice had no jurisdiction.

In the present case the affidavits showed only that there was evidence both ways: and the prisoner was remanded.

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O'MALLEY, in last Term, had obtained a rule *nisi* for a *habeas corpus ad subjiciendum* to bring up the body of George Bailey, a prisoner in the house of correction of Usk in Monmouthshire, and a similar rule in the matter of John Collier, also a prisoner in the same place. On the last day of last Term it was, by consent, ordered that cause should be shown before Erle, J., at chambers during the vacation, and that what the *learned Judge should direct should have the same effect as if done by the Court at that time. At chambers, affidavits were used on both rules. Among them was one by the prisoner George Bailey, who stated that he was committed for two months, by a justice of the peace, charged by one George William Hutchinson with having absented himself from the work of Messrs. Marshall & Co., his employers. And he deposed: "that it was agreed, between his said employers and himself and fellow workmen, that the rules of his said employers' colliery should be the same as in Messrs. Prothero's colliery, namely, to be paid by the ton monthly pays, and a month's notice on leaving or being discharged; but that the price per ton should arise or fall with the price in Messrs. Prothero's works, without notice. And deponent further saith that, in the month of October last, he was working on the said contract, and that on the first day of December last the price did rise in the works of the Messrs. Prothero. And deponent further saith that a rise in price was then requested by the colliers of his employers' said colliery according to the said agreement, which was refused; and, upon this refusal, the deponent and the rest of the colliers ceased working: and this is the misconduct alleged against this deponent, and for which he is now undergoing separate confinement and hard labour." "That deponent is not bound under the said contract to any hours of working; nor is he bound to cut any quantity of coal: that the employment in the said colliery depends on the demand for coal: that there is not always full employment: that deponent is only paid by the ton of coal: that no allowance is made for loss of time when trade is slack or the works stopped by accident." The affidavit then proceeded *to enter into details of matters not relevant to the questions now discussed in Court.

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Collier made an affidavit precisely similar to that of Bailey, except

that it stated, in addition, that “this deponent had a son working with him on the said contract, and who is employed and paid by this deponent, and not by his said employers.”

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In opposition, the affidavit of George William Hutchinson (sworn in *Bailey's* case) was used. He, by it, deposed that he was the agent of Messrs. Marshall & Co., and that he appeared before the magistrate to support the charge of misconduct against George Bailey, “who is a man in the employ of the said Messrs. Marshall & Co., as a collier; that he then proved the custom of the work and the particular contract between him and his employers; and that he also proved the breach of the said contract by the said George Bailey.” After several statements not bearing on the questions now discussed in Court, the affidavit added: “that the said contract between the said George Bailey and his said employers, Messrs. Marshall & Co., was, that he, the said George Bailey, should serve his said employers as a collier, until a month's notice should be given, either by himself, the said George Bailey, or his employers. And that the contract between the prisoner and his employers, as to wages, was, that the price was to be one shilling and tenpence per ton of coal cut, and was to rise or fall with the generality or line of collieries in the district; and that no allusion whatever was made to the colliery of the Messrs. Prothero; but that the price was not to affect the month's notice: and that the said contract was for the said George Bailey to serve his employers, the said Messrs. Marshall & Co., exclusively. And that, by the terms of the said *contract, the said George Bailey could not work for any other person during his said service, and until the expiration of his month's notice. And this deponent further saith that, at the time the said George Bailey was brought before the said justice, the prices for cutting coal had not risen generally. And this deponent further saith that the said contract between the said George Bailey and his said employers, the said Messrs. Marshall & Co., was that, if trade was slack, or works stopped by accident, the said Messrs. Marshall & Co. would consider themselves, by the said contract, compelled, either to provide the said George Bailey, and the other colliers employed at their said colliery, with work, or pay them reasonable wages. And this deponent further saith that the said George Bailey entered upon his said service with the said Messrs. Marshall according to the terms of the said contract.” In *Collier's* case he made a similar affidavit.

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At chambers, before Erle, J., the principal question raised was,

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whether the contract between the prisoner and Messrs. Marshall & Co. was such that the conduct of the prisoner could be considered a breach of it. The learned Judge thought the question one of importance and difficulty. He ordered that the rule should be absolute for a writ to issue, and, by consent, that the prisoner should in the mean time be discharged out of custody, on entering into recognizances to appear, if called upon, at the return of the writ.

The returns of the gaoler to the two writs set out as the ground on which he had detained the prisoners the warrants of commitment. The material part of that in *Bailey's* case was as follows.

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"To the constable of" &c., "and to the keeper of" &c.
"Whereas, on" &c., "at" &c., "George William *Hutchinson, of"
&c., "agent to John Marshall and others, of" &c., "trading as Messrs. Marshall & Co., coke and colliery proprietors, personally came before G. H., Esquire, a justice" &c., "and then and there made information and complaint upon oath before me the said justice, that George Bailey, of" &c., "collier, did, on" &c., "at" &c., "contract with the said John Marshall and others, to serve the said John Marshall and others, in the capacity and employment of a collier, for the term of one month, and so on from month to month, determinable nevertheless on either of the said parties giving to the other one month's previous notice of their intention to determine the said contract, at and for the wages of one shilling and ten pence per ton for cutting coal: and that the said George Bailey did, afterwards, to wit on" &c., "at" &c., "enter into his said service according to the said contract: and that the said George Bailey, afterwards and before the term of his said contract was completed, to wit on" &c., "at" &c., "was, in the execution of the said contract and otherwise respecting the same, guilty of a certain misconduct and misdemeanor, in this, to wit, that he, the said George Bailey, did then and there, and before the term of his said contract was completed, unlawfully absent himself from his said service without the consent of his said masters, and without any lawful excuse, contrary to the form of the statute in that case made and provided: and that the place where the said George Bailey was so employed under the said contract is within the said county of Monmouth: And whereas the said George Bailey was, this 10th day of December, A.D. 1853, at the parish of Bedwelty in the same county, duly convicted before me, the undersigned G. H., one of her Majesty's *justices of the peace in and for the said county of Monmouth, of the said offence

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so charged upon him in and by the said information as aforesaid; and I, the same justice, adjudged that the said George Bailey, for his said offence, should be committed to the said house of correction at Usk aforesaid, in the said county of Monmouth, there to remain and be held to hard labour for the term of two calendar months, according to the form of the statute in such case made and provided: These are therefore to command you, the said constable, forthwith to take the said George Bailey, and him safely to convey to the said house of correction at Usk aforesaid, and there to deliver him to the keeper thereof, together with this precept: and you the said keeper are hereby commanded to receive the said George Bailey into your custody in the said house of correction, there to remain and to be kept to hard labour for the term of two calendar months. And for your so doing this shall be your sufficient warrant. Given under my hand and seal" &c.

The return in *Collier's* case set out a precisely similar warrant. The returns respectively then proceeded to excuse the keeper from bringing up the body as commanded by the Court, by showing that the prisoner had been discharged on his own recognizances, in obedience to the rule of Court drawn up pursuant to the order of ERLE, J. The returns having been now read in Court,

Smythies moved for the discharge of both prisoners:

There are objections to the warrant, in each case, apparent on it; and, also, there is an objection going to the root of the whole matter, namely that there was no such contract between the prisoners and Messrs. Marshall * & Co. as to give rise to the relation of master and servant, and so give the justices jurisdiction; and no breach of the contract, such as it was. To raise this last objection recourse must be had to the affidavits.

[*613]

J. W. Huddleston, for the committing magistrate, objected to the use of the affidavits. He stated that there was reason to believe that, if the conviction were quashed, an action would be commenced against his client; and, that being so, he could not on his behalf waive any objection: but he offered to waive all technical points, and discuss the question solely on the merits, if an undertaking to bring no action were given.

Smythies :

It is proposed to use the affidavits, not for the purpose of contradicting the return, but to show that the justice who made the

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warrant had no jurisdiction. It appears from the affidavits that this was not a contract of service at all: the employers were not bound to find work; the prisoner was at liberty to work or not as he pleased; all that is agreed on is that, if the prisoner, either by himself or his agents, cut coal, much or little, he is to be paid a price for it; and that the prisoner shall not cut coal for any one else during the time this agreement was not determined. There was no consideration for the contract so as to make it binding; and, supposing that it was binding, there was no breach.

J. W. Huddleston :

[*614] If the undertaking not to bring an action is given, the justice will consent to have these points raised, and the Court will decide whether the conclusions the justice drew from the evidence were right or not. But, at present, the question is *not whether the justice was right, but whether he had jurisdiction; for, if he had, his finding is conclusive.

(LORD CAMPBELL, Ch. J. : As at present advised, I think that the prisoner may use affidavits to show that there was no evidence before the justice from which he could reasonably infer that there was a contract creating the relation of master and servant, as that would show that there was no jurisdiction in the justice. But, if there was such evidence, it is immaterial to show that there was other evidence from which the justice might have inferred the contrary; for that would only go to show that the finding of the justice on a matter within his jurisdiction was wrong.)

The affidavits used at chambers were then referred to: it did not appear by them explicitly what evidence was given before the justice; but the argument proceeded on the assumption that the affidavits of the prisoner and of Hutchinson, before stated, contained the facts brought before the justice.

Smythies :

The evidence shows that there was no contract for service at all. The colliers are left free to do as much or as little as they please; it is thought that the obligation not to work for any one else will be a sufficient inducement to make them work.

(LORD CAMPBELL, Ch. J. : There may very well be a contract, such as you suggest, not amounting to an engagement on the part of the employed to work. I may contract with a fisherman that I will

buy all the fish he catches at a regulated price, he being free to fish or not if he pleases. But I may also contract with a fisherman that he shall fish for me every day as my fisherman, his remuneration being regulated by the quantity of fish he may catch. Is it possible to say that there was no evidence justifying *the justice in thinking the prisoner's contract of this latter kind ?)

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At least there was no consideration for the contract. The employers were not bound to find work for the prisoner: *Williamson v. Taylor* (1). It would have been a very improvident bargain if they had contracted to do so; for their colliery might be stopped by a flood, or some other accident over which they had no controul.

(LORD CAMPBELL, Ch. J.: It may very well be that they did not contract to keep their colliery open, and yet that if, the colliery being open, they excluded the prisoner they would have broken their contract. If they agreed to keep up the relation of employers and employed, it would be a breach if they renounced it; and such an agreement would be ample consideration. And it may be that the other party did not bind himself to work every day, so that it would be no breach of his engagement if he took an occasional holiday, yet, if he engaged to continue the relation of employer and employed, it would be a breach of his engagement to renounce it by entering upon a strike.

Huddleston referred to that part of the affidavit of Hutchinson in which it was stated that the employers considered themselves bound either to provide the men with work or pay them wages.

CROMPTON, J.: *Reg. v. Welch* (2) and *Pilkington v. Scott* (3) go far to show that the employers were so bound. But, in the mode in which the point is raised, the only question is whether the prisoner can show affirmatively that the contract was such that the justice had not jurisdiction.)

In *Reg. v. Welch* (2) the servant had agreed to work personally. In this case it appears from Collier's affidavit that the colliers employed workmen under them. * * *

Then the conviction is bad on the face of it; as it does not state that the evidence was on oath, or taken in the presence of the prisoners. * * *

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(1) 5 Q. B. 175.

(3) 71 R. R. 781 (15 M. & W. 657).

(2) 95 R. R. 598 (2 El. & Bl. 357).

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J. W. Huddleston, contra, was desired by the COURT to confine his argument to the last point only :

The distinction between this case and those cited depends on the peculiar nature of the enactment in stat. 4 Geo. IV. c. 34, s. 3. If it appear to the justice that the accused is guilty, the justice is authorized to commit him. The justice must therefore in substance convict the accused, and make a warrant for his commitment. But he is not called upon to make the warrant a record of the conviction: he may do so if he pleases; and, if he does make it a record of the conviction, then it must have all the requisites of a conviction. * -

[*617] *Lindsay v. Leigh* (1) shows only that the justice *may make a single instrument that shall be both a conviction and a warrant of commitment, and that, if he does make such an instrument and return it, a formal conviction subsequently drawn up is too late. The instrument in the present case is a warrant of commitment on a conviction, following the form (P. 1) in the schedule to stat. 11 & 12 Vict. c. 43. * * *

LORD CAMPBELL, Ch. J. :

That authority shows that the instrument in the present case is sufficient. It is not a conviction, but a warrant in execution of a previous conviction; and, being so, it does not require the formalities of a conviction. There may, under this statute, be an instrument drawn up of a hybrid character, so that it is at once a conviction and a warrant; but the instrument in the present case does not fall within that category. There is nothing in the decision in *Lindsay v. Leigh* (1) to show that there may not be a separate conviction, as under ordinary Acts, and a warrant founded on it, though, by the provisions of this particular Act, such a conviction may be dispensed with, in favour of the prosecution. Then there is nothing *here to show that the witnesses were not, in point of fact, sworn, and examined in the presence of the prisoners, or that the prisoners had not in fact the full benefit of every thing to which they were entitled: and this, being a warrant, is in this respect good on the face of it.

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It is also good on its face, as showing that there was a contract of service, and a breach of that contract. Still it would be open to the prisoners to show that the justice had no jurisdiction: and, if they showed that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was a

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contract of service and a breach of it, I think this would show that he exceeded his jurisdiction. In the present case let us proceed on the supposition (which is not strictly borne out by the proof) that the statements in the affidavits were the same statements which were in evidence before the justice. Can we, looking at them, say that there was no evidence from which he might justly infer a contract of service? If the contract was, like that which I supposed during the argument to have been made with a fisherman, a contract to buy the proceeds of their labour, it would not be a contract of service. But the justice was fully warranted in inferring that this was a contract to serve for a month, and to be paid according to the work done. It has been said that there was no consideration for such a contract; but I, on this evidence, think that there was an obligation on the part of the employers, not merely to pay for the work done, but also to employ the men: not, I think, necessarily to find them work day by day; but an obligation to continue the relation of master and servant; so that, if the master causelessly refused to give the servant work, whilst the colliery was open, he would *have broken his contract. That obligation on the part of the master would be ample consideration for the servant's promise. Then it is said that the contract was not one for personal service: and it appears that one of the men was permitted to employ another person to assist him; but still there was evidence enough before the justice from which he might infer that the contract bound the men to work personally. Then, if there was evidence from which the justice was warranted in concluding that there was a contract for service, it was for his determination whether there was a breach. I have no jurisdiction to review his determination on that point; and I do not inquire whether it was right or not.

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WIGHTMAN, J.:

The first question is, Whether it has been affirmatively shown, contrary to the allegations in the warrant, that the justice had no jurisdiction. It is alleged in the warrant that there was such a contract as would give the justice jurisdiction; and the *onus* is cast on those impeaching the warrant of showing that there was no reasonable ground on which the justice might find this. It is not enough that there was ground on which he might have reasonably found that there was no such contract; for the justice is not bound to believe one side more than another: and, therefore, if there was

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any evidence before him from which he might reasonably infer that there was such a contract, it is enough. It is said that there was nothing to justify the justice in inferring that the contract was one for personal service; but it is agreed on both sides that a month's notice was stipulated for, and that till it was given the miner was not to be at liberty to enter into the service of any one else. Now I think that it is a reasonable inference from *those provisions alone that the bargain was for his personal services.

As to the formal point, I quite agree. There is nothing in the case of *Lindsay v. Leigh* (1) at all in conflict with our present decision. The court of error there said, in effect, that, if there is an order of commitment under this Act, no other formal conviction is required, and the instrument in such a case is both the conviction and the warrant; though, if it is an order of commitment, it does not require the same formalities as a conviction. But there is nothing in *Lindsay v. Leigh* (1) to show that there may not be separate instruments, one a conviction and the other a warrant. If we are to treat the instrument in the present case as a conviction, we contradict its terms; for it recites a previous conviction. It is therefore a warrant only.

ERLE, J.:

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I agree that the prisoners must be remanded. As to the point of form. It is important to lay down a rule by which persons enforcing the law may be relieved from the risk of being defeated on formal grounds. The words of the Act in question, "it shall and may be lawful for such justice to commit every such person," have raised the difficulty. The Legislature contemplated that the justice might convict and commit at once. Accordingly, there have been a series of cases in which attempts have been made to unite in one instrument the record of the conviction and the warrant for the imprisonment; and a series of objections, arising from the twofold nature of those instruments. At last in *Reg. v. Richards* (2) the two instruments *were separated. It seems to me that the points before the court of error in *Lindsay v. Leigh* (1) did not raise the question whether this might be done. I have no hesitation in supporting the doctrine of PATTESON, J. in *In re Gray* (3), that it is by no means necessary that the conviction and warrant

(1) 11 Q. B. 455.

(2) 5 Q. B. 926.

(3) 2 Dowl. & L. 549.

of commitment should be in the same document. Here they are not; and consequently the warrant is formally good.

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As to the point of substance, it had great weight with me at chambers. But the question is now so raised that the only point is whether the justice had reasonable grounds for finding a contract of service. I always thought it a case in which any man might doubt: and now, when I find that three Judges are inclined, on this evidence, to think that a contract of service actually existed, it is of course out of the question to say that the justice might not reasonably draw the same conclusion.

CROMPTON, J.:

As to the point of form. I can see nothing to show that this warrant was not founded on a good previous conviction.

As to the point of substance. Certainly I am not prepared to say that there was no reasonable ground for finding that there was such a state of things as would give the justice jurisdiction. The point on which I should feel most doubt, if it were necessary to find the fact, is, as to whether this was a contract for personal service. But there was evidence tending to show that it was; particularly the evidence of an agreement that the employers would find work or pay wages; an agreement which could never be made if the miner was not *to work himself, but might employ

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Prisoners remanded.

GURNEY v. BEHREND (1).

(3 El. & Bl. 622—637; S. C. 23 L. J. Q. B. 265; 18 Jur. 856; 2 W. R. 425; 23 L. T. O. S. 89.)

1854
May 2, 3.

B., a Dantzic merchant, sold wheat to W., an Amsterdam merchant, to be paid for by drafts, to be drawn by B. on C., a London merchant, against bills of lading. W. was in fact, though that was not disclosed to B., acting for P., another London merchant. W. wrote to C. opening a credit, on account of P., in favour of B., to be drawn on against bills of lading, P. to be debited with the amount. B. forwarded a bill of lading, indorsed by him in blank, to C. in a letter stating that, "according to instructions from

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(1) Cited, *Pease v. Gloaher*, *The Marie Joseph* (1866) L. R. 1 P. C. 219, 35 L. J. P. C. 66, 15 L. T. 6; *The Argentina* (1867) L. R. 1 A. & E. 370, 376, 16 L. T. 743; *Coventry v. Gladstone* (1867) L. R. 4 Eq. 493, 37 L. J. Ch. 30; *Hathesing v. Laing* (1873) L. R. 17 Eq. 92, 100, 43 L. J. Ch. 233, 29 L. T. 734.

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W.," we hand you bill of lading, "and request you to follow" his instructions respecting the document, "by whose order, and for whose account," we draw on you, "which drafts we recommend to your kind protection." On the day after C.'s receipt of this letter, the draft was left with C. for acceptance. P., on the same day, being in actual possession of the bill of lading, pledged it with G., who *bonâ fide* gave value for it. On the evening of the same day, P. was arrested on a criminal charge; and he afterwards became bankrupt. C. did not accept the draft; and, on the ensuing day, became bankrupt. W. also failed. B. stopped the cargo *in transitu*. G. brought trover against him for the cargo.

On a case stating the above facts, with power for the Court to draw inferences of fact:

Held, that B. *primâ facie* had the right to stop *in transitu*; and that G., though a *bonâ fide* transferee for value of the endorsed bill of lading from P., was not entitled to the cargo, unless P. had, not merely possession of the bill of lading, but a right to transfer it; inasmuch as bills of lading are not negotiable to the same extent as bills of exchange.

But held, that C. was entitled to hand over the bill of lading to P.; the letter from B. not imposing any condition to prevent C. from doing so. And the COURT, as an inference of fact, thought that C. had so handed it over to P.

Judgment for plaintiff.

TROVER for wheat: Pleas, Not guilty, and Not possessed.

On the trial, before Lord Campbell, Ch. J., at the London sittings after Trinity Term, a verdict passed for the plaintiffs, with 3,725*l.* damages, subject to a case.

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By this it appeared, that the plaintiffs were London money merchants trading under the firm of Overend, Gurney & Co., and the defendants merchants at Dantzic trading under the firm of Th. Behrend & Co. The action was brought to try the right to the cargo of the ship *Erute*, which the plaintiffs claimed as holders of the bill of lading. The bill of lading was for wheat in bulk, shipped by Th. Behrend & Co. at Dantzic, deliverable in London to order or assigns, and was indorsed in blank by Th. Behrend & Co. On 2nd February, 1853, the ship arrived in the Thames, and defendants took possession of the cargo in the ship, and kept it. The case showed that Overend, Gurney & Co., in the ordinary course of business, made an advance on the security of the bill of lading to Messrs. Coventry and Sheppard on the 8th January, 1853. Coventry and Sheppard had, in the course of business, made large advances to Robert Ferdinand Pries, in London, and had received this bill of lading from him, on the same 8th January, as a part security for these advances, and for fresh advances then made. Robert Ferdinand Pries was a corn merchant, then in good credit: but, on the evening of the same day, he was arrested on a criminal charge, not connected with this bill of lading, and had since become

bankrupt. The case stated the particulars of these transactions at some length : it appeared that the whole was *bonâ fide* as regarded Overend, Gurney & Co. and Coventry and Sheppard ; so that the real point was, whether Pries had obtained the bill of lading under such circumstances as to be able to confer a good title on a *bonâ fide* transferee. The circumstances under which Pries obtained the bill of lading were thus stated in the case. The cargo was bought of the defendants by Mr. E. Werthemann, a merchant at Amsterdam : Werthemann in point of fact bought *the corn for Pries ; but that fact was unknown to the defendants. They only knew Werthemann in the transaction ; and payment of the price at the rate of 40s. per quarter was to be made in the manner stated in the following letters. Collmann and Stolterfoht, mentioned in those letters, were a firm, in a large way of business as merchants and commission agents, who had had very large dealings with Pries during the time he was in business.

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On the 31st December, 1852, Werthemann wrote and sent the following letter to Messrs. Collmann and Stolterfoht, London.

“AMSTERDAM, 31st December, 1852.

“By order and for account of Mr. Robert F. Pries, I beg to inform you that I have opened a credit with your house in favour of Messrs. Th. Behrend & Co. in Dantzic for 10,000*l.* : Ten thousand pounds.

“I therefore request you to honour the drafts at 2 m.-d. of said Dantzic friends for this amount, against bills of lading of wheat, at the rate of 40s. per quarter, and to debit Mr. Robert F. Pries for them. E. WERTHEMANN.”

On the 4th January, 1853, the defendants forwarded the said bill of lading of the *Erute* to Messrs. Collmann and Stolterfoht, at London, in a letter of which the following is a copy.

“DANTZIG, 4th January, 1853.

“According to instructions from Mr. E. Werthemann, Amsterdam, we have the pleasure of handing you inclosed bill of lading of 9,200 scheffels wheat, with 200 bags and 700 mats, by the ship *Erute*, Capt. Zielcke, to that (1) port, and request you to follow the instructions of said Amsterdam friend respecting these documents, by whose order, and for whose account, we have to-day taken the liberty of valuing on you 3,418*l.* 2 m. d. o. *R. Warschaur & Co., which drafts we recommend to your kind protection for account of Mr. E. Werthemann. TH. BEHREND & Co.”

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(1) *Sic* : but obviously meaning London, not Amsterdam.

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This letter of the 4th January was received by Messrs. Collmann and Stolterfoht (with the bill of lading) on the 7th January : and they replied to it, on the 8th of January, by a letter of which the following is a copy.

“Your favour of the 4th inst. is to hand with B. L. of 9,200 scheffels of wheat shipped, by order of Mr. E. Werthemann in Amsterdam, to this port per *Erute*, Capt. Zielcke, with which document we shall follow the orders of said friend. Your drafts on us against this shipment amounting 3,418*l.* 2 m.d. will be promptly protected on presentation, for account of Mr. E. Werthemann. COLLMANN AND STOLTERFOHT.”

On the same 8th day of January (which was a Saturday), the defendant's said drafts for 3,418*l.*, drawn conformably to said letters, were left by the defendants' agents (Messrs. Hambro & Son, of London) at the counting house of Collmann and Stolterfoht there for acceptance, according to the usual and ordinary custom in cases where bills of exchange are left for acceptance.

On the morning of Monday the 10th of January, in accordance with the custom in such cases, a clerk of Messrs. Hambro & Son called at the counting house of Collmann and Stolterfoht for the said bills of exchange, when they were handed to him dishonoured and without ever having been accepted. On the bills of exchange being returned to Hambro & Son dishonoured, on Monday the 10th, they demanded of Collmann and Stolterfoht the return of the bill of lading also : but it was not then, or at any time afterwards, returned to them, or to the defendants. It appeared, in evidence at the trial, that *the bill of lading was in Collmann and Stolterfoht's possession on the morning of Saturday, the 8th of January. On the 10th of January, Coventry and Sheppard had notice from Collmann and Stolterfoht that they, Collmann and Stolterfoht, claimed the bill of lading. On the same 10th of January, Collmann and Stolterfoht stopped payment. Werthemann also stopped payment ; and the defendants have never been paid any part of the price of the wheat.

The wheat was shipped on board the *Erute* under a charter-party, which was set out in the case. By it Th. Behrend & Co. chartered the *Erute* for a voyage from Dantzic to London. There was nothing peculiar in the terms of the charter-party.

After setting it out, the case stated : “No evidence, save as aforesaid, was given, on either side, of the circumstances under which Pries had possession of the bill of lading. The Court are to

have the same power as a jury to draw inferences. The question for the opinion of the Court is: Whether the plaintiffs are entitled in this action to recover the value of the wheat less the freight and charges paid by the defendants. If they are, then the verdict is to stand for the plaintiffs for 8,725*l.*; otherwise a nonsuit, or verdict for the defendants, is to be entered as the Court may direct."

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The case was now argued (1).

Willes, for the plaintiffs :

The defendants, being unpaid vendors, had a *prima facie* right to stop the goods *in transitu* had not the bill of lading been indorsed for value to the plaintiffs. It is clear that the holder of a bill of lading is entitled to the cargo as against the *unpaid vendors: *Lickbarrow v. Mason* (2): but the defendants say the plaintiffs are not holders of the bill of lading, inasmuch as, they say, Pries could not transfer it to them. That raises two questions; one of fact, viz.: whether Pries, on the 8th of January, obtained the bill of lading from Collmann and Stolterfoht with their consent, or stole it: and one of law, viz.: what the effect of his obtaining it by their consent was. Now, as to the question of fact, there seems but one inference to be drawn. * * Surely the inference is that Collmann and Stolterfoht had allowed him to take it. That raises then the second question, viz.: whether Collmann and Stolterfoht and Pries could, together, give a good title to the cargo by the transfer of this bill of lading. As to that, the defendants mean to contend that the correspondence *shows that the bill of lading was deposited with Collmann and Stolterfoht, subject to a condition that, before the bills of lading should be parted with, the drafts should be accepted. If such were the condition between the defendants and Collmann and Stolterfoht, it still could not affect a *bonâ fide* taker of the bill of lading, for value and without notice. It would be most dangerous to commerce, if secret conditions could be attached to documents of this sort, on the face of them transferable without any condition. But, in the present case, there was no such condition even as between the parties. [He then referred to the letters of January 4th and January 8th and proceeded:] But what is there in the letters to indicate any wish, on the part of Th. Behrend & Co., that the drafts should be accepted before the bill of lading was parted with, if

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(1) Before Lord Campbell, Ch. J., 357; 5 T. R. 367, 683; 6 T. R. 831; Wightman, Erle and Crompton, JJ. 4 Br. P. C. 57; 1 Sm. L. C.).

(2) 1 R. R. 425 (2 T. R. 63; 1 H. Bl.

GURNEY Werthemann's instructions should be that it was to be parted
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[*629] (CROMPTON, J. : The draft and the bill of lading were not attached to each other. The bill of lading was sent direct ; and the draft, for anything apparent in the letters, *might be put in circulation, and pass through many hands, so as to be long of coming for acceptance : and Pries's instructions, which you say were in law Werthemann's, were, as you wish us to infer as a fact, given on the morning of the 8th January before the time for accepting the drafts had come.)

Precisely so. If a consignor wishes to keep the controul of the cargo he must keep the bill of lading in his own hands or in those of his agents : *Key v. Cotesworth* (1), *Turner v. Trustees of the Liverpool Dock* (2).

Bramwell, contra :

[*630] The plaintiffs are not such holders of the bill of lading as to be entitled to defeat the right to stop *in transitu*. Bills of lading are transferable, not negotiable like bills of exchange : and the right to the cargo could not be given by Pries even to a *bonâ fide* purchaser, unless Pries was possessed of the bill of lading under such circumstances as to enable him to transfer the title under it. That raises the question whether Pries was so possessed, which is a mixed question of law and fact. It is quite clear that the vendors of goods, consigning them to a purchaser, may so deal with the bill of lading as to preserve to themselves a security that the cargo shall not be delivered, unless the drafts they draw for the price are accepted. It is a common thing for the consignor to send the bills of lading and the drafts together to his agent, with directions to give up the bills of lading when the drafts are accepted. Had Th. Behrend & Co. in the present case sent the bill of *lading and the draft to Collmann and Stolterfoht with such directions, it would have been clear that they retained a lien : and, if Collmann and Stolterfoht had, under that state of facts, parted with the bill of lading to Pries, it would have been in violation of their duty ; and Pries, who would thus tortiously have got possession of the bill of lading, could not have conferred any right on the plaintiffs. * * Now, in the present case, the course pursued by Th. Behrend & Co. was exactly

(1) 86 R. R. 750 (7 Ex. 595).

(2) 86 R. R. 377 (6 Ex. 543).

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equivalent to sending the bill of lading and draft to Collmann and Stolterfoht with instructions not to part with the one till the other was honoured. The letter of 4th January from Th. Behrend & Co., in which was inclosed the bill of lading, states that they had drawn against the shipment. Collmann and Stolterfoht ought to have understood that to mean that they were, in the ordinary course, to keep the bill of lading till the drafts were accepted: and, even supposing that they were not legally bound to do so, the Court will not infer, as a fact, that they did deliver it to Pries in violation of the ordinary course of business.

(CROMPTON, J.: The course of business, which you describe, was common enough a few years ago: the bill of lading was attached to the draft and sent to an agent with directions not to part with it till the draft was accepted; and, particularly in the trade between America and Liverpool, it was common enough to insist on retaining *the bill of lading till the draft was not only accepted but paid, or satisfactory security given that it would be ultimately paid; and questions of great nicety arose when the right so to retain it was disputed. But I always understood this to be an exceptional course, adopted only in times of peril and suspicion; whilst your argument assumes that it is the ordinary course of trade ⁽¹⁾.)

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LORD CAMPBELL, Ch. J.: The bill of lading was not in this case attached to the draft: on the contrary, the letter of 4th January tells Collmann and Stolterfoht that it was drawn at two months, to the order of R. Warschaur & Co., a third party; so that it might continue in circulation and not be presented for acceptance for the whole of these two months. Do you say that the vendee was to have his power to deal with the goods suspended till an event over which he could have no controul? That would be hard on him.

ERLE, J.: Must you not take the letters of 4th January and 31st December together? Th. Behrend & Co. say "Follow the instructions of said Amsterdam friend respecting these documents." The instructions were in the letter of 31st December.)

E. Werthemann's right to give instructions was conditional on the drafts being accepted. Further: this is not a case of stoppage *in transitu*, but a case in which the property never vested in the

(1) *Dictum* appd. *Coventry v. Gladstone* (1867) L. R. 4 Eq. 493, 37 L. J. Ch. 30.

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[*632] (CROMPTON, J.: *There are cases in which the consignment is for the purchaser, and yet the vendor has preserved the controul by keeping back the bill of lading.)

It is difficult to see how that is consistent with the goods being on account and at the risk of the purchaser during the voyage.

(CROMPTON, J.: That difficulty, which is considerable, was much discussed in *Turner v. Trustees of the Liverpool Docks* (2).)

Besides that, the goods were on board a ship chartered by Th. Behrend & Co., and therefore not *in transitu*, but in the possession of Th. Behrend & Co.

(LORD CAMPBELL, Ch. J.: Can you for this purpose make a distinction between a general ship and a chartered ship?)

It is said that the drafts, being foreign bills, were accepted by the letter of 8th January.

(LORD CAMPBELL, Ch. J.: You need say nothing on that point: if Th. Behrend & Co. stipulated, at all, for an acceptance before the bills of lading were parted with, it was for an acceptance on the face of the drafts; moreover, a promise to accept is not an acceptance unless at the option of the promisee; and there is nothing here to show that there was an election to take the letter of 8th January as an acceptance.)

Willes, in reply. * * *

Cur. adr. vult.

[633] LORD CAMPBELL, Ch. J., on a subsequent day in this Term (May 3rd), delivered judgment:

We think that the only question in this case is, whether the defendants had a right to stop *in transitu* the cargo of the *Erute*,

(1) 86 R. R. 750 (7 Ex. 595).

(2) 86 R. R. 377 (6 Ex. 543).

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on the 2nd of February, when they took possession of it. We cannot doubt that, subject to the right of stopping *in transitu*, the property vested in the vendee, when the cargo had been loaded at Dantzic, and the indorsed bill of lading had been sent off by the defendants to Collmann and Stolterfoht. Nor does there seem to us to be any ground for contending that the defendants afterwards continued in possession of the cargo. They had chartered the ship; *i.e.* they had entered into a contract with the captain, that he would carry the cargo in his ship from Dantzic to London; but the ship was not theirs: he was bailee of the cargo; and it was in the possession of the carrier. There can be no lien without possession; and the claim of the defendants to a lien as unpaid vendors is quite unfounded. From such considerations the equitable right of an unpaid vendor to stop *in transitu* took its origin: and this right would have been wholly unnecessary, if the goods, while *in transitu*, could be considered in the possession of the vendor.

Primâ facie the defendants had a right to stop the wheat on the 2nd of February; for it was still *in transitu*, and they were unpaid vendors. The *onus* lies on the plaintiffs, to prove that they had become the owners, and that the right to stop *in transitu* was gone. For this purpose it is not enough that they had become *bonâ fide* holders of the indorsed bill of lading, for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, *which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it, as against the shipper of the goods. The bill of lading only represents the goods: and, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented.

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We are therefore to inquire whether this bill of lading is to be considered as having come into the possession of the plaintiffs, before the stoppage *in transitu*, with the authority of the defendants.

And this depends entirely upon whether Collmann and Stolterfoht had authority from the defendants to deliver it to Pries. We think it as clear that Collmann and Stolterfoht delivered it to Pries, as that Pries delivered it to Coventry and Sheppard, and Coventry and

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Sheppard to the plaintiffs. But, if this delivery to Pries was a misappropriation of the bill of lading, the rights of the defendants will be the same as if it had remained in the hands of Pries, or of Collmann and Stolterfoht, till the 2nd of February, in which case the stoppage *in transitu* would have been rightful.

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It is contended on the part of the defendants that Collmann and Stolterfoht had no authority to part with the bill of lading till they had accepted the bill of exchange drawn for the price of the wheat. If this be so, they certainly exceeded their authority; for their promise to accept, which was not treated by the agents of the *defendants as an acceptance, would not have been a performance of the condition on which the right to part with the bill of lading depended. The defendants might easily have imposed such a condition, had they suspected the solvency of the parties with whom they were dealing. But, looking to the correspondence set out in the special case, and to all the circumstances of the transaction, we are of opinion that no such condition was imposed, and that, as soon as Collmann and Stolterfoht received the bill of lading, they were at liberty to hand it over to Pries, so as to make the result the same as if, by the bill of lading, Pries had been the consignee, the defendants had remitted it to him, and he had indorsed it before handing it over to Coventry and Sheppard. There is nothing on the bill of lading itself to indicate that it is not to be transferred till the bill of exchange has been accepted. In the defendant's letter of 4th January no such condition is to be found; and, on the contrary, they desire Collmann and Stolterfoht to follow the instructions of Werthemann respecting the bill of lading, Werthemann being the agent of Pries, and having purchased the cargo for him. They go on to say that they have drawn the bill of exchange for the price, but merely "recommend it to protection," without saying any thing that can be construed into a direction that this protection shall be given before the instructions of Werthemann are followed respecting the bill of lading. There seems no reason to doubt that the defendants would have been perfectly satisfied with the answer written to them on the 8th of January, in which Collmann and Stolterfoht first say that they will follow the directions they had received respecting the bill of lading; and afterwards, in a separate sentence, add that they would protect the bill of exchange "on presentation."

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The circumstances of the transaction, instead of raising the supposed condition by implication, are rather inconsistent with it.

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While the bill of lading is forwarded to Collmann and Stolterfoht, the bill of exchange is sent to Messrs. Hambro & Son. The bill of exchange happened to be left for acceptance on the 8th of January: but *ab initio* being dissevered from the bill of lading, it might have been negotiated at Dantzic; and, circulating over the north of Europe, it might not have been presented to the drawees for a month afterwards. Would Collmann and Stolterfoht have been bound to keep the bill of lading in their hands during the whole of this time? On the contrary, we think that Pries, having lodged the credit according to his undertaking, was immediately entitled to have the bill of lading delivered up to him, on producing an order to that effect from Werthemann; and he could not be made to run the risk of a fall in the market in the interval elapsing before the bill was presented for acceptance.

If the language of the letter of 4th January were equivocal, the construction to be put upon it ought rather to be against the party who places an indorsed bill of lading in the hands of third persons, and enables them to deal with others as if they had complete controul over it; but, in this case, we think that the language of the defendants, expressly and clearly, authorized the unconditional transfer of the bill of lading to the purchaser.

No decision or *dictum* was cited in the argument which at all conflicts with the view we have taken of this case: and we conceive that it is in entire conformity with the various decisions relied upon by the plaintiffs. These we abstain from commenting upon, as they appear to be in harmony with each other, and we entirely *approve of them. Ever since the great case of *Lickbarrow v. Mason* (1) the law has been considered to be that the *bonâ fide* transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop *in transitu*, as against the purchaser; and we believe it to be of essential importance to commerce that this law should be upheld. For these reasons we give

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Judgment for the plaintiffs.

(1) See note (2), *ante*, p. 691.

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REG. v. INHABITANTS OF BENJEWORTH.

(3 EL. & BL. 637—640; S. C. 2 C. L. R. 1540; 23 L. J. M. C. 124; 18 Jur. 402.)

No settlement is gained by the occupation of a tenement, by reason of payment of rates under stat. 3 & 4 W. & M. c. 11, s. 6(1), if the payment be made by a party not authorized by the occupier to make the payment.

ON appeal against an order of two justices, for removal of Harriet Berrington, the wife of John Berrington, and her three lawful children, from the parish of St. James, Clerkenwell, in Middlesex, to the parish of Benjeworth in Worcestershire, the Sessions confirmed the order, subject to the opinion of this Court upon a case stating substantially as follows.

The grounds of removal, so far as material to the case, alleged as follows.

Harriet Berrington was the wife of John Berrington, a prisoner under sentence of transportation. In 1832, John Berrington hired by the year a separate and distinct tenement, consisting of a dwelling-house situate in the *parish of Benjeworth, at the rent of 30*l.* a year; and he held, rented and actually occupied and resided in the said house, under the said yearly hiring, for two years; and he paid the said rent in each of such years; and he was charged with, and paid his share of, the poor rates of the said parish in respect of the said house, and resided therein for forty days after payment thereof.

The appellants in their grounds of appeal traversed these settlements.

At the trial of the appeal, the respondents relied solely upon the settlement by payment of taxes. And they proved that settlement to the satisfaction of the Court of Quarter Sessions, if the following facts as to the payment of the poor's rate are sufficient in point of law.

It was proved by Harriet Berrington, the wife, that she had seen the poor rates, in respect of the house in question, paid on two several occasions by her husband, John Berrington, during his occupation thereof; and that she believed they continued to live there for more than two months after the last payment. The appellants called John Berrington; who stated that he had no recollection of having paid any rates or taxes for the house in question; and that, if they were paid, the payments were made for him by his wife's father, as he had not the means of paying them. The respondents then called for the rate books which they had

(1) See 35 Geo. III. c. 101, s. 4; 6 Geo. IV. c. 57, s. 2; 1 Will. IV. c. 18, s. 2; 4 & 5 Will. IV. c. 76, s. 66.

given the appellants notice to produce; but the appellants did not produce them.

“The Court of Quarter Sessions found, upon the evidence, that the rates were paid by the father-in-law for the pauper, and that he resided for upwards of forty days after payment; but that he had no authority from the pauper to pay them.”

The question for the opinion of this Court is whether, on the above evidence and finding, the Sessions were right in confirming the order. If so, order of removal and order of Sessions to stand confirmed; if otherwise, to be quashed.

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TANTS OF
BENJE-
WORTH.

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Pashley, in support of the order of Sessions:

The question is, whether this was a payment by John Berrington of rates, within stat. 3 & 4 W. & M. c. 11, s. 6. He occupied the tenement, and was assessed. On the other side, it will be contended that, inasmuch as the father-in-law had no authority from the pauper to pay, the rates were not, in legal effect, paid by the pauper. But in *Rex v. Bridgewater* (1), where a friend of the pauper, without any communication with him, and in his name, paid land tax to prevent a distress, this was held to be a payment by the pauper.

Archbold and *Clarkson*, *contra*, were not called on.

LORD CAMPBELL, Ch. J.:

Can any stranger to a man make himself the man's creditor by paying his debt? In *Rex v. Bridgewater* (1) the Court must have understood the Sessions to have thought there was an authority; if they did not, I think the decision not law. Here the authority is expressly negatived.

WIGHTMAN, J.:

I suppose the COURT in *Rex v. Bridgewater* (1) thought that the authority was to be inferred from the relation of the parties.

CROMPTON, J. (2):

That must have been their inference of fact, right or wrong. They could not have meant to break in upon the principles of common law.

Order of Sessions quashed.

(1) 3 T. R. 550.

(2) Erle, J. was absent.

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REG. v. JARVIS.

(3 EL. & BL. 640—642; S. C. 18 Jur. 1051; 23 L. T. O. S. 77.)

Under stat. 5 & 6 Will. IV. c. 63 (1), the Sessions have power to appoint inspectors of weights and measures (2); and, for such appointment, they may, if they think fit, select inspectors and superintendents of rural police (acting under stat. 2 & 3 Vict. c. 93): and therefore such appointment cannot be removed by *certiorari*, sect. 36 of stat. 5 & 6 Will. IV. c. 63 (1) taking away the *certiorari*.

POWER, in this Term, obtained a rule calling on the defendant to show cause why the writ of *certiorari* in this prosecution should not be quashed, and the return made thereto taken off the file of this Court and sent back to the Sessions.

From the affidavit on which the rule was obtained, it appeared that, at a Quarter Sessions holden for Suffolk on 1st February, 1854, for the appointment of inspectors of weights and measures, under stat. 5 & 6 Will. IV. c. 63 (1), the Sessions appointed an inspector and four superintendents of police to be inspectors of weights and measures for four districts respectively. Nothing was contained in the order respecting salary. The order was afterwards removed by a writ of *certiorari*, obtained at chambers, under the order of CROMPTON, J.

Worlledge now showed cause:

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The order is bad, for want of jurisdiction; and therefore, though sect. 36 enacts that no proceeding under the Act shall be removed by *certiorari*, the order will be quashed. By sect. 10 of *the Rural Police Act, 2 & 3 Vict. c. 93, the superintendents of police are forbidden to employ themselves in any other way than under that Act.

(WIGHTMAN, J.: That is "for hire or gain." In this case the appointments are not at a salary.)

This is for hire or gain, because stat. 5 & 6 Will. IV. c. 63, s. 17, makes it a duty of the justices to direct a remuneration to the inspectors whom they appoint.

(CROMPTON, J.: If the justices appointed these superintendents without salary in order that they might fill up the time for which they were paid under the Police Act, was that an act in excess of jurisdiction? The power to give a salary does not make it unlawful

(1) Repealed: 41 & 42 Vict. c. 49, s. 86.

(2) See now 41 & 42 Vict. c. 49, s. 43.

not to give a salary, if the person to whom it would be paid, if given at all, consents to act gratuitously.)

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The two appointments of the same person are illegal, because the duties are inconsistent. The inspectors must on certain days be at certain places: the superintendent may be required by the calls of that office to be elsewhere than at the particular place where, as inspector, he ought to be. Is he to neglect the duties of one of the two offices?

(WIGHTMAN, J.: That surmise does not show that the appointment was one which the justices had not jurisdiction to make.)

Power and Couch, contra, were not called on.

LORD CAMPBELL, Ch. J.:

It is quite clear that this writ ought not to have issued. We should be exceeding our jurisdiction were we to interfere with the discretion of the justices in the matter.

WIGHTMAN and CROMPTON, JJ. (1) concurred.

Power applied for costs.

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LORD CAMPBELL, Ch. J.:

We should have made the rule absolute without costs, were it not that the attention of my brother CROMPTON, to whom the application for this writ was made at chambers, was not drawn to the section by which the *certiorari* is taken away.

Rule absolute with costs.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

FISHER v. BRIDGES (2).

(3 EL. & BL. 642—650; S. C. 23 L. J. Q. B. 276; 1 Jur. N. S. 157.)

1854.
May 4, 10.

Action on a covenant to pay money. Plea, which the COURT construed as meaning that there had been an illegal agreement that, for a price to be paid to the plaintiff, land should be sold and conveyed to defendant for an illegal object; that the land was conveyed to defendant for that object;

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(1) Erle, J. was absent.

Maclure (1881) 19 Ch. D. 478, 51

(2) Foll. *Geere v. Mare* (1863) 2 L. J. Ch. 253, 45 L. T. 747, revd. 21 H. & C. 339, 33 L. J. Ex. 50. Cited, Ch. D. 309, 51 L. J. Ch. 857, 47 *Yorkshire Railway Wagon Co. v.* L. T. 200.

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and that afterwards the deed was executed to secure payment of the price :

Held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the plea was good. For, the deed being given as a security for the payment of a debt tainted with illegality, the law, which would not enforce the payment of the debt, would not enforce the payment of the security.

THE following abstract of the record in this case is taken from the judgment of the Court of Exchequer Chamber, delivered in this case by JERVIS, Ch. J.

[*643] "The declaration states, in substance, that the defendant by his deed covenanted with the plaintiff, for himself, his heirs, &c., that he, the defendant, his heirs, &c., should and would well and truly pay to the plaintiff, his *executors, &c., the sum of 630*l.*, with interest on a day named.

"The defendant pleaded, first, that, before the making of the deed in the declaration mentioned, it was unlawfully agreed, by and between the plaintiff and the defendant, that the plaintiff should sell &c. to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of, certain land &c., for the residue of a term, subject to a mortgage, at and for and in consideration of a certain sum of money, to be therefore paid by the defendant to the plaintiff, to the intent and for the purpose, as the plaintiff at the time of the making of the agreement well knew, that the land &c. should be exposed to sale and sold by way of lottery &c., contrary to the form of the statute ; and further that, afterwards, in pursuance of the said illegal agreement, the said lands &c. were sold, transferred and assigned for the residue of the term, subject as aforesaid, and, a part of the purchase or consideration money, to be paid by the defendant to the plaintiff for the same, being unpaid, the defendant, to secure the payment thereof to the plaintiff, made the covenant in the declaration mentioned, the said 630*l.* being parcel of that money.

"The second plea was in substance the same as the first, except that it stated the sale to be colourable.

"At the trial, the jury found the first plea for the defendant : and, the Court of Queen's Bench having given judgment for the plaintiff, *non obstante veredicto*, the defendant below brought this writ of error."

The case was now (1) argued.

(1) Before Jervis, Ch. J., Pollock, JJ., and Parke, Platt and Martin, C.B., Cresswell, Williams and Crowder, Barons.

Hugh Hill, for the defendant below, in support of the suggestion of error :

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The original agreement, as disclosed on the plea, is in itself illegal ; it is an agreement for the purpose that the lands may be exposed to sale and sold by way of lottery ; which is rendered penal by stat. 12 Geo. II. c. 28, s. 1. The contract itself therefore is void and cannot be enforced at law : *Bartlett v. Vinor* (1), *De Begnis v. Armistead* (2). It was not disputed below, and probably will not be disputed now, that the general principle is clear, that all things done in contravention of a statute are illegal. * * But the Court of Queen's Bench, admitting that no action would have lain on the agreement, decided that an action lay on this instrument under seal, inasmuch as a deed requires no consideration. The error lay in construing this plea as merely showing no consideration ; when rightly construed, it shows that there was a consideration, and that it was an illegal one. First : the language of the plea shows that the bond was given as part of the machinery for carrying out the illegal purpose. * * But, even if it was not part of the original scheme that a bond should be given for the price, yet, if it appears that the bond was given, not gratuitously, but to secure the fulfilment of an illegal agreement, the law will not lend its assistance to enforce the security, as it would not have enforced the debt. * * *

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Willes, contra :

The greater part of the principles laid down on the other side are admitted : yet the plea is bad, and the judgment below correct. A deed requires no consideration to support it ; and therefore the plea is not good unless it shows the deed was given for an illegal consideration. No question can arise as to the sufficiency of the consideration : the plea must affirmatively show that the consideration was bad. Now, though it was illegal to agree to purchase land for the purpose of selling it by lottery, and though it was illegal to sell the land by lottery, yet, after the land had been conveyed to the purchaser by the vendor, it was the moral duty of the purchaser to pay the price. It is not a duty which the law would enforce : but, after one party has suffered prejudice, and the other party has obtained benefit, it is, at least, not wrong or wicked to *make compensation. It is as proper to pay

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(1) Carth. 251.

(2) 38 R. R. 406 (10 Bing. 107).

FISHER for an estate previously obtained by an antecedent illegal bargain
 v. as to pay compensation to a woman for past seduction. * * *

BRIDGES.

(PARKE, B.: * * It is true that a bond given in consideration of bygone seduction is not invalid. But, if a bond were, after seduction, given to secure the price promised beforehand, would that be valid?)

Yes, unless it was part of the previous bargain that such a security should be given: the securing the payment would be but an act of common honesty. * * *

[647] H. Hill, in reply. * * *

Cur. adv. vult.

JERVIS, Ch. J., on a subsequent day in this Term (May 10), delivered judgment:

This is a writ of error from the Court of Queen's Bench. (After stating the pleadings as *ante*, p. 702, his Lordship proceeded.)

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The first question is, What is the meaning of the plea? It was said in the argument that it did not sufficiently affect the plaintiff with a participation in the intent and purpose of ultimately selling the land &c. by lottery, because the interposition of the words "as the plaintiff at the time of the making of the said agreement well knew" showed that the plaintiff merely knew of the *intent. But we think that the plea cannot be so read. After verdict every fair intendment must be made in favour of the plea, giving full effect to all the words used: and, finding, as we do in the plea, a distinct averment that the agreement between the plaintiff and the defendant for the sale was to the intent and for the purpose of the future lottery, we cannot qualify that allegation so as to make the plea bad, merely because it is added, perhaps unnecessarily, that the plaintiff knew of that intent.

It was also said in the argument, and this point formed the basis of the judgment of the Court below, that it did not appear that the covenant was given in pursuance of the agreement or was connected with it. Perhaps, if it were necessary to make the plea good, it might after verdict be taken to mean that the lands were sold and transferred in pursuance of the agreement, and also, the consideration money being in part unpaid, that the covenant was given in pursuance of the agreement. But according to the view we take of this case it is not necessary that the plea should be so

understood. It clearly shows that the covenant was given to secure the payment of a part of the purchase or consideration money for the lands the subject of the agreement.

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Upon the record so framed, and so understood, in our opinion the plaintiff in error is entitled to judgment: and we therefore think that the judgment of the Court below must be reversed.

It is not denied that the original agreement was tainted with illegality. All lotteries are prohibited by stat. 10 & 11 Will. III. c. 17, s. 1: and, by stat. 12 Geo. II. c. 28, s. 4, all sales of houses, lands, &c. by lottery are declared to be void to all intents and purposes.

The agreement, being illegal, could not be enforced; *and no action could be brought for the recovery of the purchase money of the lands the subject-matter of the illegal agreement. This was conceded in the Court below; it was not denied in the course of the argument before us; and, if necessary, might be established by many authorities. But it is said that the covenant may be good, and may be enforced at law, even though the original agreement were illegal and the purchase money not recoverable, by reason of that illegality, if it had not been secured by an instrument under seal. It is certainly true that for a bond, or other instrument under seal, no consideration is necessary; but it does not therefore follow that every such instrument may be enforced by an action. The authorities cited in the argument show that, where the bond or other instrument is connected with the illegal agreement, it cannot be enforced: *Lightfoot v. Tenant* (1), *Paxton v. Popham* (2), *The Gas Light and Coke Company v. Turner* (3): and therefore, if this plea alleges that the covenant was given in pursuance of the illegal agreement, it would upon these authorities be an answer to the action.

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But, if it is not so understood, we think it shows a good defence. It is clear that the covenant was given for payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

The case of *Beaumont v. Reeve* (4), much relied upon *in the Court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good

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(1) 4 R. R. 735 (1 Bos. & P. 551).

(3) 5 Bing. N. C. 666.

(2) 9 East, 408.

(4) 70 R. R. 552 (8 Q.B. 483).

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considerations for a parol promise; but they are not therefore illegal considerations. They are no considerations at all: and, inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant, to pay a sum of money tainted with illegality, can be enforced merely because a bond for maintenance, founded upon past cohabitation or previous seduction, is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced.

For these reasons we are of opinion that the judgment must be reversed.

Judgment reversed.

IN THE QUEEN'S BENCH.

1851.
May 5.

FAGG v. NUDD.

(3 El. & Bl. 650—652; S. C. 2 C. L. R. 680; 23 L. J. Q. B. 289; 18 Jur. 699.)

[The only question in this case was one of pleading under the Common Law Procedure Act, 1852, now superseded by the new rules of pleading under the Judicature Acts and Rules.]

IN THE EXCHEQUER CHAMBER.

1854.
May 6.

(ERROR FROM THE QUEEN'S BENCH.)

MAYOR OF BERWICK v. OSWALD.

(3 El. & Bl. 653—683; S. C. 23 L. J. Q. B. 321.)

[This decision was affirmed in the House of Lords, sub nom. *Oswald v. Mayor of Berwick*, as reported in 5 H. L. C. 856.]

IN THE QUEEN'S BENCH.

1854.
May 6.

BURCHFIELD v. MOORE.

(3 El. & Bl. 683—687; S. C. 2 C. L. R. 1308; 23 L. J. Q. B. 261; 18 Jur. 727.)

An unauthorized alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, even as against a *bond fide* holder, subsequently taking the bill for value and without notice of the alteration.

[Superseded by Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64.]

REG. v. OVERSEERS OF KINGSWINFORD.

(3 EL. & BL. 688—694; S. C. 23 L. J. Q. B. 337; S. C. nom. *R. v. Staffordshire JJ.*, 18 Jur. 1073.)1854.
May 8.
[688]

A rule was obtained calling on the overseers of a parish to show cause why two justices should not issue their warrant, under s. 38 of stat. 3 & 4 Will. IV. c. 90 (the Parochial Lighting and Watching Act), to levy by distress on the goods of the overseers two sums of money ordered to be paid by the inspectors of a district within the parish, in which the provisions of that Act had been adopted. By the affidavits it appeared that the district was one assigned to a chapel for ecclesiastical purposes, under stat. 1 & 2 Will. IV. c. 38; and that the provisions of stat. 3 & 4 Will. IV. c. 90, had been adopted, more than two years before the application, at a meeting convened by the churchwardens of the district church. These churchwardens, as was shown affirmatively by the affidavits, were churchwardens for ecclesiastical purposes only, and never in the habit of calling meetings for secular purposes:

Held, that the meeting was improperly convened, the churchwardens of the district church not being such churchwardens as are contemplated by stat. 3 & 4 Will. IV. c. 90, s. 5; that consequently the provisions of the Act had never been duly adopted in the district; and that the order of inspectors was void.

Rule discharged.

KEATING, in Hilary Term, had obtained a rule calling on the overseers of the poor of the parish of Kingswinford, and on two justices of Stafford, to show cause why the two justices should not issue a warrant to levy two several sums of money ordered to be raised by the inspectors appointed under stat. 3 & 4 Will. IV. c. 90, for the purposes of that Act, within the district of Brierly Hill in that parish, by distress on the goods and chattels of the overseers.

The rule was obtained on an affidavit, by which it appeared that Brierly Hill, within the parish of Kingswinford, is a district, assigned for ecclesiastical purposes, under stat. 1 & 2 Will. IV. c. 38, to a church or chapel, called St. Michael's, Brierly Hill, and that the churchwardens are annually elected for this district. On 12th August, 1851, a requisition, signed by three ratepayers of the parish of Kingswinford, inhabitants of Brierly Hill, was addressed to the churchwardens of Brierly Hill, calling on them to appoint a time and place for a public meeting of the ratepayers of Brierly Hill, for the purpose of determining whether the provisions *in stat. 3 & 4 Will. IV. c. 90 (the Act for Watching and Lighting Parishes) should be adopted, and be carried into execution in that parish. The churchwardens of Brierly Hill, accordingly, within ten days of the receipt of the requisition, convened a meeting for 25th August, 1851, by a notice, which was affixed to the door of the church of Brierly Hill. The meeting was held on 25th August, 1851; when the

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provisions of the Act, so far as related to lighting, were unanimously adopted. Twelve inspectors were appointed at the same meeting; and the amount to be raised was fixed. Notice of the adoption of the Act was given by the churchwardens in the same way as that in which notice to convene the meeting had been given. The affidavit then proceeded to show, at considerable length, the proceedings of the inspectors: as the Court expressed no opinion on the various points raised on these proceedings, they are not further noticed in the report. It appeared that, on 18th November, 1853, complaint was made by the inspectors, to a justice of the peace, that the overseers of the parish of Kingswinford had not obeyed an order, made upon them by the inspectors, to levy a sum of money required for the purposes of the Act; that a summons was issued to the overseers, under sect. 38, to appear before two justices, and that they did appear before them on the 24th November, 1853, where these various matters were proved, but the justices refused to issue their distress warrant.

The affidavits in answer, besides raising several points on which the Court expressed no opinion, showed that the churchwardens of Brierly Hill, at the time the provisions of the Act were supposed to be adopted, were only churchwardens for ecclesiastical purposes, and that all the parish business of the whole of Kingswinford, *including Brierly Hill, was transacted by the churchwardens of Kingswinford; those of Brierly Hill never, in fact, interfering, or calling any meetings for any secular purpose.

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Hugh Hill and Cowling now showed cause :

The provisions of stat. 3 & 4 Will. IV. c. 90, have never been legally adopted in the parochial district of Brierly Hill. It is not a parish, properly so called, but a district in a parish, assigned, under stat. 1 & 2 Will. IV. c. 38, for ecclesiastical purposes to a church. The provisions of stat. 3 & 4 Will. IV. c. 90, might, however have been adopted within such a district, had the right course been pursued. It does not distinctly appear whether this district of Brierly Hill has been assigned to St. Michael's Church, under sect. 10 of stat. 1 & 2 Will. IV. c. 38, or under sect. 23. If it has been assigned under sect. 10, there has been merely a delegation to a perpetual curate of part of the powers of the rector, to be exercised within that district; and the two persons appointed, under sect. 16, to act as churchwardens have their functions limited, by the same section, to matters connected with the church itself; they are not

churchwardens of the district at all. If the district is one under sect. 23, it is a completely “separate and distinct parish for all spiritual purposes;” and the churchwardens, to be appointed under sect. 25, are to “do all things pertaining to the office of churchwardens, as to ecclesiastical matters, in the said new parish, in like manner as though the same had been of old time a separate and distinct parish.” But these churchwardens are not empowered to do anything pertaining to the office of churchwarden in respect to parochial matters not ecclesiastical. Then *stat. 3 & 4 Will. IV. c. 90, s. 5, requires that the first step for adopting the provisions of that Act shall be that, on “the application in writing of three or more of the ratepayers of any parish, it shall be lawful for the churchwardens thereof” to call a meeting. Sect. 77 enacts that, “where the word ‘parish’ is used, it shall be understood to extend to any parts within the same; and that the powers given to a churchwarden shall be understood to be given to any chapelwarden, overseer, or other person usually calling any meeting on parochial business.” So the provisions of the Act might have been extended to Brierly Hill; for it is a parish within this definition; but the meeting ought to have been called by the persons “usually calling any meeting on parochial business,” that is, the churchwardens of Kingswinford; for it is clear the churchwardens of Brierly Hill never called such meetings. It may be said that the churchwardens of Kingswinford never do call meetings of the inhabitants of Brierly Hill, separately from the inhabitants of the rest of the parish of Kingswinford. If that be so, the course to be pursued is prescribed in sect. 73; and it has not been followed. (The argument on the other objections is omitted, as the Court pronounced no opinion upon them.)

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Keating and Bros, contra:

The provisions of the Act were adopted in 1851: it is too late to question the formality of the proceedings now; the same objection was raised in *Reg. v. Deverell* (1) without success.

(ERLE, J.: There it was not shown, affirmatively, that the proceedings *were wrong; and we acted on the principle of presuming *omnia rité acta*.)

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LORD CAMPBELL, Ch. J.: It is a possible thing that a meeting may be called improperly, and that an attempt may be made to

(1) *Ante*, p. 536.

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rate the inhabitants though the Act has not been legally adopted ; if an inhabitant wishes to question the legality of the proceedings, how do you say he is to do it ?)

He may appeal under sect. 66.

(CROMPTON, J. : That is a proper remedy for something irregular after the Act is adopted ; but the objection now is that the Act never was adopted. Suppose a distress, and replevin brought, the pleadings being as at common law. Could you make a good avowry without averring that the Act was properly adopted within the district, at a meeting properly called ? And would not that averment be traversable ? It is true that the fact that the district was *de facto* lighted as if the Act had been properly adopted would be evidence at the trial that it had been so, and in process of time it would be practically impossible to disprove the averment ; but it would remain necessary and traversable for ever.)

LORD CAMPBELL, Ch. J. :

The rule must be discharged. It is necessary to show us that the order of the inspectors was good, before we can be called on to command the justices to enforce it. The objection that the provisions of stat. 3 & 4 Will. IV. c. 90, have never been properly adopted in the district is fatal. I should have been glad to find that the Legislature had fixed a limited time, after the adoption of the Act, beyond which such objections should not be taken. But I find no such provision in the Act. *Mr. Bros* indeed refers us to *sect. 66. That section gives an appeal against orders made when the Act has been adopted : but, if the Act has not been adopted, the order is null and void, and no appeal is needed. Then, the objection being open, it is made ; and it goes to the root of the whole matter. The churchwardens of Brierly Hill were not the proper persons to call the preliminary meeting. The Act gives that power to churchwardens or those " usually calling meetings on parochial business." These officers of Brierly Hill, though called churchwardens, have not *de facto* been in the habit of calling such meetings, and have no powers to call any ordinary meeting for parochial business. That being so, they were not qualified to call the meeting at which the provisions of the Act were adopted ; and what was done there was void. It is unnecessary to form an opinion on the other objections raised.

WIGHTMAN, J.:

I am of the same opinion, for the same reasons as my Lord.

ERLE, J.:

The question really comes to be, whether these churchwardens of Brierly Hill are churchwardens within the meaning of sect. 5 of stat. 3 & 4 Will. IV. c. 90, as expounded by sect. 77. And I think they are not; for the churchwardens are defined to be those usually calling any meeting or parochial business, within which class the churchwardens of this district church do not come, as they have nothing to do with such meetings. And, though it might seem reasonable that the officer of the district, though not in the habit of calling such meetings, should act for the district, *in preference to the officer in the habit of acting only for the whole parish, yet that is not the intention of the Legislature; for sect. 73 expressly makes the officer of the whole competent to act for the district; and it would be inconvenient if there were concurring powers. Then, the meeting having been improperly convened, it failed; and time has not yet cured the defect.

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CROMPTON, J., concurred.

Rule discharged.

MARSDEN *v.* WARDLE (1).

(3 EL. & BL. 695—702; S. C. 2 C. L. R. 1707; 23 L. J. Q. B. 263; 18 Jur. 578.)

After execution has been awarded in the county court, and defendant's goods have been taken, but not sold, prohibition will go to restrain the Court from proceeding further, if it appear upon affidavit, though not on the face of the proceedings in the county court, that title to corporeal hereditaments came in question in the cause, so that the Judge had no jurisdiction under stat. 9 & 10 Vict. c. 95, s. 58 (2).

1854.
May 13.
[695]

C. MILWARD, in the preceding Term, obtained a rule calling on the defendant to show cause why the order of CROMPTON, J., after mentioned, should not be rescinded.

It appeared by affidavit that a plaint had been entered in the County Court for Staffordshire, holden at Leek, by Marsden against Wardle, upon a promissory note for 50*l.* given by defendant to plaintiff. On the trial, before the Judge of the county court, it was

(1) Cited, *Mayor of London v. Cox* 474, 70 L. T. 152.
(1867) L. R. 2 H. L. 239, 283, 36 (2) See now 51 & 52 Vict. c. 43
L. J. Ex. 225; *Furquharson v. Morgan* (repealing and superseding 9 & 10 Vict.
[1894] 1 Q. B. 552, 562, 63 L. J. Q. B. c. 95), s. 56.

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*proved that, upon an agreement for the purchase of land by defendant from plaintiff, the note had been given by way of deposit on the purchase money: and one defence suggested was, that the consideration for the note had failed, the title turning out not to be valid. And it was further contended that the title to a corporeal hereditament came in question in the cause, which was thus taken out of the jurisdiction by the proviso in stat. 9 & 10 Vict. c. 95, s. 58. The Judge heard the case, and, being of opinion that there was no failure of consideration, gave judgment for the plaintiff, and ordered that payment should be made in a month. The money not having been paid within that time, the plaintiff, on the 18th of last February, caused certain goods of the defendant to be taken in execution; so that the sale was lawful on 24th February. On 23rd February the defendant requested the plaintiff's attorney to extend the time for the sale to 28th February; stating that he, defendant, should by that time be able to raise money to discharge the execution. The plaintiff's attorney consented to this; and the defendant then signed a writing, by which he requested the person in possession to postpone the sale till 28th February, authorized him to remain in possession, and undertook to pay the *extra* costs.

On 24th February a summons was taken out, requiring defendant to show cause why a writ of prohibition should not issue; and, on 1st March, CROMPTON, J. ordered that the writ should issue; which was the order now in question.

In last Term (1),

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Morgan Lloyd showed cause:

The order for issuing the prohibition has been made under sect. 22 of stat. 13 & 14 Vict. c. 61, on the ground that the county court has no jurisdiction, the title to corporeal hereditaments having come in question: stat. 9 & 10 Vict. c. 95, s. 58. The rule to set aside the order has been granted on the suggestion that the application has been made too late, execution having issued, though there has been no sale of the goods seized.

(CROMPTON, J.: The point made against you is that, as the objection to the jurisdiction does not appear on the face of the proceedings, the rule applies which prevails on applications for prohibition to Ecclesiastical Courts.)

(1) May 10th. Before Coleridge, Wightman, J. left the Court towards Wightman, Erle and Crompton, JJ. the close of the argument.

The execution is not complete till sale. * * In *Jones v. Owen* (1) prohibition to the county court was granted, though the execution of the warrant of possession was complete, possession having been given to the plaintiff on the day before the bailiff had notice of the rule for the prohibition; the Judge (PATERSON, J.) saying that "the defendant came as soon as he reasonably could;" and restitution was ordered. * * It is suggested that the defect here does not appear on the face of the proceedings; and it may be asserted that there has been acquiescence in the jurisdiction. Supposing that these two facts would together constitute an answer to the application, as intimated in *Roberts v. Humby* (2) and *Buggin v. Bennett* (3), at any *rate one alone is insufficient. In *Yates v. Palmer* (4), where the party had acquiesced by moving in the county court for a new trial, and prohibition was therefore refused, the Court expressly adverted to the circumstance that the want of jurisdiction did not appear on the proceedings themselves. Here the affidavits show that the objection was taken in the county court: and, as to the argument urged from the proceedings not showing the defect, that never can occur where, as in the present case, the want of jurisdiction is the result of the question of title occurring collaterally: there are no means of getting such a question on to the written proceedings of a county court, there being no pleadings.

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C. Milward, contra :

The general rule is that prohibition does not lie after sentence: 2 Rol. Abr. 819, Prohibition (M) pl. 1, *Full v. Hutchins* (5). In the old cases, it seems as if the Courts exercised a discretion, and looked to the conduct of the party applying: *Bishop of St. David's v. Lucy* (6): and sometimes they acted upon the information of a stranger: Com. Dig. Prohibition (E) (7). But it seems to be now established that, even after sentence, prohibition will be granted if the want of jurisdiction appear on the face of the proceedings: Com. Dig. Prohibition (D). But that is not so here; the proper course for the defendant would have been to apply to the Judge to place the question on the record.

(COLERIDGE, J.: There may be means of doing that in the Ecclesiastical Courts: but I do not see how it can be done in the

(1) 79 R. R. 888 (5 Dowl. & L. 669).

(2) 49 R. R. 535 (3 M. & W. 120).

(3) 4 Burr. 2035, 2037.

(4) 6 Dowl. & L. 283.

(5) 2 Cowp. 422.

(6) 1 Ld. Ray. 447, 539, 545.

(7) See *Wadsworth v. Queen of Spain*, 85 R. R. 393 (17 Q. B. 171).

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county court, where the *question arises as here, there being no pleadings. And, that being so, is the rule which has been applied to Ecclesiastical Courts, in the authorities to which you refer us, applicable here?)

The question must be, whether the party has come in such reasonable time as to induce the Court, in the exercise of their discretion, to grant the prohibition; or else he must show himself entitled to it *ex debito justitiæ*. And, as to this last, the rule will be as in the case of the Admiralty, where, "if the suit appears out of the jurisdiction of the Admiralty, a prohibition goes, though the party has allowed the jurisdiction there:" Com. Dig. Admiralty (F 9).

(COLERIDGE, J.: How do you understand the word "appears?")

The proceedings themselves must disclose the objection; otherwise, the party who has lain by will not be heard to show it. That explanation is deducible from *Ricketts v. Bodenham* (1); and this seems to agree with the view of PARKE, B. in *Roberts v. Humby* (2). That the acquiescence of a party may estop him from objecting to the proceedings in the county court appears from *In re Jones and James* (3). In *Jones v. Owen* (4), which has been cited as establishing a different rule, the proceedings showed that the claim was for the possession of real property.

(ERLE, J.: In *Thompson v. Ingham* (5) prohibition went after sentence: and, from the record of the proceedings in prohibition, it is clear that the want of jurisdiction was not disclosed on the face of the proceedings in the county court.)

Cur. adv. vult.

[701]

COLERIDGE, J. now delivered the judgment of the COURT:

In this case, upon a rule for setting aside an order for a prohibition, the question was, Whether a prohibition should be granted to a county court for an excess of jurisdiction not appearing on the proceedings, although the writ was moved for after judgment in that Court. And we answer this in the affirmative.

There is reason for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then, if he chooses to wait and take the chance of judgment in his favour,

(1) 4 Ad. & El. 433.

(2) 49 R. R. 535 (3 M. & W. 126).

(3) 87 R. R. 518 (1 L. M. & P. 65).

(4) 79 R. R. 828 (5 Dowl. & L. 669).

(5) 80 R. R. 376 (14 Q. B. 710).

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he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below; because the complaint in that case does not rest on the evidence of the complainant; and, if such a defective record were allowed to remain, and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal. But this principle has no application to the county courts: the proceedings there do not show the matter in any formal way; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may only appear in the course of the trial; and judgment may follow almost as soon as the defence is understood. Under such circumstances, there would be no opportunity of moving for a prohibition before judgment; and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress.

In *Jones v. Owen* (1) PATERSON, J. issued a prohibition to the county court after judgment, for defect not appearing in the written proceedings. So also did this Court in *Thompson v. Ingham* (2).

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Upon these authorities and principles, we think this rule should be discharged, and the prohibition should issue.

Rule discharged.

BROWN v. BYRNE (3).

(3 El. & Bl. 703—717; S. C. 2 C. L. R. 1599; 23 L. J. Q. B. 313; 18 Jur. 700.)

1854.
May 28.

A bill of lading expressed that goods, shipped at N., were deliverable at L., to order or assigns, "he or they paying freight for the said goods five eighths of a penny sterling per pound, with five per cent. prime, and average accustomed." By the usual custom, in the trade at L., three months' interest or discount is deducted from freights, payable under bills of lading, on goods coming from certain ports, including N. The assignee of this bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law as contradicting the written contract. The assignee paid the freight, less the discount. On a case stating the above facts:

[703]

Held, that the custom was binding, and controlled the bill of lading (3).

A writ having been issued in this case, the parties, without pleadings, by consent and the order of a Judge, stated for the opinion of this Court the following case.

(1) 79 R. R. 888 (5 Dowl. & L. 669).

(3) Exple. *Hale v. Jansen* (1855) 4

(2) 80 R. R. 376 (14 Q. B. 710).

El. & Bl. 500, 510, 24 L. J. Q. B. 97.

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[704]

The plaintiff is a shipowner in Liverpool. The defendant is a merchant there, carrying on business under the firm of A. E. Byrne & Co. On the 5th October, 1853, Messrs. J. B. Byrne & Co., of New Orleans, shipped on board the ship *Courier*, a vessel belonging to the plaintiff, 110 bales of cotton, for which the master signed a bill of lading, of which the following is a copy.

“Shipped in good order and well conditioned, by J. B. Byrne & Co., on board the ship called the *Courier*, whereof Gemmill is master, now lying at the port of New Orleans, and bound for Liverpool, to say, one hundred and ten bales cotton, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the aforesaid port of Liverpool (the dangers of the sea only excepted) unto order or to assigns, he or they paying freight for the said goods five eighths of a penny sterling per pound, with 5 per cent. primage, and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished the others to stand void. Dated in New Orleans, the 5th day of October, 1853. JOHN GEMMILL.”

This bill of lading was forwarded to the defendant, indorsed to him. On the arrival of the vessel at Liverpool, in February last, the defendant claimed and received the 110 bales of cotton, as indorsee and holder of the said bill of lading. On the cargo being delivered, [a debit note for 145*l.* 9*s.* 10*d.*] was rendered to the defendant for the freight.

[705]

The defendant has offered to pay 148*l.* 13*s.* 7*d.* on account of this freight: but he refuses to pay the balance 1*l.* 16*s.* 3*d.*, on the ground that, by the custom of Liverpool, he is entitled to a deduction of three months' discount from the freight.

It is admitted that, according to the usual custom prevailing amongst merchants and shipowners in Liverpool, three months' interest or discount is deducted from freights payable under bills of lading, on goods coming from certain ports in the Southern States of America, viz. New Orleans, Mobile, Charleston and Savannah, whether such freights are paid by the shippers, the consignees named in the bill of lading, or by the assignees of the bill of lading. The custom does not entitle the merchant to three months or any credit for freights, which are always due on delivery; nor does it extend to the Northern American ports, or to Apalachicola in the South; freights from those ports being always payable in cash without any deduction. The plaintiff contends that the custom is

not good in law, being inconsistent with the written document. The Court is to be at liberty to draw any inference of fact which a jury might draw.

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The questions for the Court are : Whether the custom to deduct three months' discount from freights is good in law ; and Whether the plaintiff is, under the circumstances of the case, entitled to recover the said sum of 1*l.* 16*s.* 3*d.* from the defendant.

The case was argued in Easter vacation (1).

Mellish, for the plaintiff :

There are two questions *involved : First, whether the custom is admissible, to give a construction to the bill of lading, as between the parties to that written instrument ; Second, supposing that the custom is not admissible, as between the parties to the instrument, whether it is admissible between the shipowner and the defendant who is an assignee of the bill of lading. As to the first. There is no difference, in this respect, between a bill of lading and any other written contract. Evidence is always admissible to interpret the words used in a writing, and to show that, by custom, these words have acquired an artificial sense. It is also admissible to annex incidents as to which the contract is silent ; but the incidents thus annexed must not be inconsistent with what is expressed. Confusion often arises from not distinguishing between these two rules. In the present case it is clear that it is not sought to translate words used in an artificial sense. It is not alleged that either of the words " paying " or " freight " has by custom acquired in Liverpool a peculiar sense ; for these words, when used in bills of lading from other ports to Liverpool, have their ordinary meaning. It is therefore an attempt to say that, in this particular trade, a written contract to pay 145*l.* 9*s.* 10*d.* for the carriage of 110 bales of cotton shall, by custom, bind the party to pay 143*l.* 18*s.* 7*d.* and no more. Such a custom directly contradicts the written contract. * * *

[*706]

(ERLE, J. : Do you make a distinction between a written contract, and one expressed in the same words, but verbal ?)

[707]

Evidence might be received to explain a verbal contract, but not a written one. * * Evidence of an usage, between the parties, to

(1) On Friday, May 11th. Before Coleridge, Wightman, Erle and Crompton, JJ.

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give credit was excluded in *Ford v. Yates* (1), because it contradicted the written contract.

(WIGHTMAN, J.: In *Syers v. Jonas* (2), at the trial, I rejected evidence of a custom that all sales in the tobacco trade at Liverpool were by sample, on the ground that it varied the written contract which was silent as to any sample. The Court of Exchequer decided that I was wrong.)

That decision has been much questioned in *Spartali v. Benecke* (3). In that latter case the contract in writing was for a sale of goods "to be paid for by cash in one month, less 5l. per cent. discount." The Court of Common Pleas held that this implied a sale on credit, and an immediate delivery, and that evidence of a custom that buyers had an option to take delivery at any time till the expiration of the period named in the contract, but must pay the price on delivery, was inconsistent with the writing, and was inadmissible. The principle is laid down in *Blackett v. Royal Exchange Assurance Company* (4), by Lord LYNCHURST: "Usage may be admissible to explain what is doubtful, it is never admissible to contradict *what is plain." If the custom be admissible to show that "paying freight for the said goods five eighths of a penny sterling per pound" means paying less than five eighths of a penny, it seems impossible to exclude custom in any case.

[*708]

(CROMPTON, J.: Suppose that there were a customary allowance in estimating the weight of the pound. That would affect the sum to be paid. In *Bold v. Rayner* (5), the bought note was for 100 tons of palm oil "to be taken from the quay at landing weights, with customary allowances." The sold note was simply for 100 tons. At the trial, PARKE, B. admitted evidence that there was a custom that palm oil was to be taken from the quay at landing weights, with certain known customary allowances; and he ruled that, this custom being incorporated in the written contract, there was no variance between the bought and sold notes.)

It might be there admissible as showing that ton does not mean twenty hundredweight, as in *Smith v. Wilson* (6), where 1,000

(1) 58 R. R. 471 (2 Man. & G. 549).

(2) 76 R. R. 515 (2 Ex. 111).

(3) 84 R. R. 532, 543 (10 C. B. 212, 226).

(4) 37 R. R. 695 (2 Cr. & J. 244, 249).

(5) 46 R. R. 322 (1 M. & W. 343).

(6) 37 R. R. 536 (3 B. & Ad. 728).

rabbits was shown to mean sixty score. It is a case of the translation of a word used in an artificial sense. * * Then, as to the second point, the promise, to be inferred from the taking of the goods without payment, is to pay the full amount for which the holder had a lien ; and, that being so, the assignee has promised to pay according to the original contract ; and there is no difference between the liability of an assignee and that of a party to the bill of lading.

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Blackburn, contra :

Perhaps it is not possible to reconcile all the cases on this subject, or to lay down accurately the limits to the admissibility of custom. But the cases agree in laying down limits which certainly include this case. It may be convenient first to answer a question, put from the Bench, as to whether there is a distinction between written and verbal contracts. There is a difference ; but in this respect there is none. When the parties have agreed that a particular writing shall be the record of their contract, they cannot by other evidence show that their intention was something different from what they have expressed in that record. When there is no record of the contract, the intention is to be gathered, not only from their words, but from everything else. But, if the parties met for the first and last time, and made a contract entirely by words, these words would, if proved, have precisely the same construction as if they had been written down. In either case the contract is to be gathered from the meaning of the words. *Ford v. Yates* (1) is a case referable to this distinction between a writing which is *the record of a contract, and one which is only, along with other things, evidence of intention. There the Judge at Nisi Prius seems to have thought the memorandum not the record of the contract ; the Court in banc took a different view of the fact, and thought it was so. But, whether the contract be in writing or verbal, all incidents annexed by law or by custom are tacitly understood ; *In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis* : Pothier *Traité des Obligations*, Partie 1, c. 1, sect. I, art. 7, § 95 (2). * * In *Syers v. Jonas* (3) PARKE, B., in delivering the judgment of the Court, says : " There is no doubt that in mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex

[*710]

(1) 58 R. R. 471 (2 Man. & G. 549).

(3) 76 R. R. 618 (2 Ex. 116).

(2) Tom. I. p. 52 (ed. 1827).

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customary *incidents. In the case of *Hutton v. Warren* (1) the law on this subject was laid down fully and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the tenor of the written instrument." In the present case, if the wording of the bill of lading had been "he or they paying freight for the said goods five-eighths of a penny per pound, cash without deduction," the tenor of the instrument would have expressly excluded the custom; but there are no such words. Then the question is, not whether the custom if admitted will vary, or be inconsistent with, the contract as it would stand without the custom, but whether it is impliedly excluded by the tenor of the instrument. The other mode of enunciating the proposition has been used by high authorities, but evidently is inaccurate. No one ever did or ever will seek to annex an incident by proof of a custom, except for the express purpose of varying the contract from what it would be if the custom were not proved. In *Syers v. Jonas* (2) the verdict for the plaintiff was set aside, because the contract for the sale of tobacco, with the customary incident that it should be equal to sample, was materially different from the written contract for a sale generally. In *Bold v. Rayner* (3) there was a material variance between the bought and sold notes; and, if the custom had not been proved, the plaintiff must have been nonsuited: *Sievwright v. Archibald* (4). But the evidence of custom entitled the plaintiff to a verdict because it did vary the contract. Then, are the words here such as to show impliedly that the parties intended to exclude the custom? *Paying is not a technical word: *Turney v. Dodwell* (5). In *Gaskill v. Skene* (6) the word "payment," used in the particulars of demand, was to be construed. ERLE, J., there says: "It is true that, in pleading, a lesser sum cannot be treated as payment of a greater. But particulars of demand are to be construed, not as pleadings, but in the sense which the words bear in ordinary use. Now every one knows from his own private experience, and we judicially learn in the course of the trials before us, that a larger debt may, by a customary trade allowance, or by deducting discount or otherwise, be discharged by the payment of a smaller sum, and that in common language the account would then be said to be paid." If for the word "paying" in the bill of lading this explanation be substituted, it will become impossible to contend that the tenor of the instrument impliedly excludes

(1) 46 R. R. 368 (1 M. & W. 466).

(2) 76 R. R. 515 (2 Ex. 111).

(3) 46 R. R. 322 (1 M. & W. 343).

(4) 85 R. R. 353 (17 Q. B. 103).

(5) *Ante*, p. 409.

(6) 14 Q. B. 664, 671.

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the custom. It is true that the result is, that the invoice, which, without the custom, would be right, is, with the custom, wrong. But, as has been pointed out by the COURT, the same result would happen if, instead of a customary discount on the money, there were a customary allowance on the weight; and *Bold v. Rayner* (1) is an express authority that such a customary allowance is implied. In the same case other customs were admitted. * * In *Grant v. Maddox* (2) an engagement of an actress for "three years, at a salary of five, six, and seven pounds per week in those years respectively," which, unexplained, would have bound the defendant to pay fifty-two times five pounds in the first year, was cut down by the admission of a custom, amongst theatrical people, to make no weekly payments to actors during the vacation. These are all stronger cases than the present. What is said by Lord DENMAN in *Trueman v. Loder* (3) was not material to the decision in the case, but was *obiter* merely. The doubt whether the admission of custom was originally expedient had been before expressed by PARKE, B. in *Hutton v. Warren* (4), by Lord ELDON in *Anderson v. Pitcher* (5), and, according to Lord ELDON, by Lord HOLT, though the passage referred to (6) scarcely bears out the assertion as to Lord Holt. But all those great Judges thought the rule well established, and not now to be departed from. *Spartali v. Benecke* (7) professed to lay down the same rule, though it seems doubtful if it was correctly applied in that case.

[713]

Then, supposing that, between the parties to the bill *of lading, the custom is excluded, still this defendant is not liable. His contract is not implied by law, but is to be inferred as a fact: *Sanders v. Vanzeller* (8): the promise to be inferred is that he will pay as usual *de facto*, whether the usage is, as between the parties to the bill of lading, enforceable at law, or not.

[*714]

(CROMPTON, J.: It would be most inconvenient if there were one rule for the consignee, and the other for the assignee.)

It cannot be denied that there is evidence to support a finding either way.

(WIGHTMAN, J.: We are here a jury: and I think you must be

(1) 46 R. R. 322 (1 M. & W. 343).

(5) 5 R. R. 565 (2 Bos. & P. 164, 168).

(2) 71 R. R. 815 (15 M. & W. 737).

(6) *Lethulier's case*, 2 Salk. 443.

(3) 52 R. R. 451 (11 Ad. & EL. 598).

(7) 84 R. R. 532 (10 Q. B. 212).

(4) 46 R. R. 368 (1 M. & W. 475).

(8) 62 R. R. 359 (4 Q. B. 260).

BROWN content to have the verdict found against you, subject to the first
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 BYRNE. point.)

Mellish was heard in reply.

Cur. adv. vult.

• COLERIDGE, J., now delivered judgment :

[*715]

This was a special case extremely well argued before my brothers Wightman, Erle, Crompton and myself at the sittings after last Term, by *Mr. Mellish* and *Mr. Blackburn*. And the question for decision is shortly this : Whether, in an action by a ship owner against the indorsee of a bill of lading, to whom goods have been delivered at Liverpool, and who has accepted them, the bill of lading making them deliverable he “paying freight for them five-eighths of a penny sterling per pound, with 5*l.* per cent. prime, and average accustomed,” the latter may lawfully claim to retain from 18*l.* 11*s.* 3*d.*, the amount of the freight at the rate specified, 1*l.* 16*s.* 8*d.*, on the ground that, by the custom of Liverpool, he is entitled to a deduction of three months’ discount from the freight. It is admitted *that the custom exists in fact, in regard of shipments from New Orleans, and some other ports in the Southern States of the American Union, to Liverpool : but it is objected to as bad in law, because it is inconsistent with the written document, the bill of lading. Five-eighths of a penny on the weight of the cargo is, it is said, equal to 18*l.* 11*s.* 3*d.* : the bill must be read as if that sum were specified in it ; and this custom, if allowed, will change it to 136*l.* 15*s.*

The principles on which this case is to be decided are perfectly clear : the difficulty lies in the application of them to the facts. Mercantile contracts are very commonly framed in a language peculiar to merchants : the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large : evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages ; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding : evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied

or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to *exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither, in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than “a thousand,” “a week,” “a day?” Yet the cases are familiar in which “a thousand” has been held to mean twelve hundred, “a week” a week only during the theatrical season, “a day” a working day (1). In such cases the evidence neither adds to, nor qualifies nor contradicts the written contract; it only ascertains it, by expounding the language. Here the contract is, to pay freight on delivery at a certain rate per pound: is it inconsistent with this to allege that, by the custom, the ship owner, on payment, is bound to allow three months’ discount? We think not. The written contract expressly settles the rate of payment: the custom does not set this aside; indeed it adopts it, as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the ship owner undertakes to allow three months’ discount on freight paid after that rate; the latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed, or if, from the language of it, the intention of the parties could have been collected, that *the freight at the specified rate should be paid, free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above. *Webb v. Plummer* (2) and *Hutton v. Warren* (3) are cases which illustrate this principle. In the first of these, by the custom of the country the outgoing tenant was bound to do certain acts, and entitled to receive certain compensation; but the lease which

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[*717]

(1) See *Smith v. Wilson*, 37 R. R. 536 (3 B. & Ad. 728); *Grant v. Maddox*, 71 R. R. 815 (15 M. & W. 737); *Cochran*

v. Retberg, 5 Esp. N. P. C. 121.

(2) 21 R. R. 479 (2 B. & Ald. 746).

(3) 46 R. R. 368 (1 M. & W. 466).

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formed the written contract bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the others: and the Court held that the expression as to some excluded the implication as to the remainder, and that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and no more. The custom therefore would have been repugnant to the contract. But in the latter case, in which the former was expressly recognised, the Court held that a specific provision, as to a matter *dehors* the custom, left the custom untouched and in full force. This latter case appears to us like the present: the contract settles the rate of freight: whether or not discount is to be allowed on the payment, it leaves open; and to that the custom applies.

Our determination on this point makes it unnecessary to say anything as to a difference which was contended for by the defendant between the original shipper and the indorsee of the bill of lading.

We are of opinion that judgment should be entered for the defendant.

Judgment for the defendant.

1854.
May 29.
[718]

EX PARTE MAWBY (1).

(3 EL. & BL. 718—721; S. C. 18 Jur. 906; S. C. nom. *Ex parte Joyce*,
23 L. J. M. C. 153.)

Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, this Court refused to grant a *mandamus* ordering a fresh election. Though the persons, whose votes had been rejected, were parties to the application.

LUSH moved for a rule, calling on the vicar and churchwardens of the parish of Bowin, in Lincolnshire, to show cause why a *mandamus* should not issue, commanding them to convene a meeting of the inhabitants in vestry, for the election of a churchwarden for the remainder of the present year.

It appeared by affidavit that, pursuant to the provisions of stat. 13 & 14 Vict. c. 99 (2), the inhabitants of the parish in vestry assembled, about 12th September, 1850, duly declared and ordered that the owners of tenements in the parish, the yearly rateable value whereof should not exceed 6*l.*, should be rated and assessed

(1) Cited *Shaw v. Thompson* (1876) (2) See sect. 1: repealed, S. L. R. 3 Ch. D. 233, 251, 45 L. J. Ch. 827, 1875.
34 L. T. 721.

to the rates for the relief of the poor in respect of such tenements, instead of the occupiers thereof; and that such order had never been rescinded, and still remained in full force. The affidavit set out extracts from an assessment for the relief of the poor, made 27th March, 1854, by which it appeared that the rating had been made in conformity with the order.

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MAWBY.

The custom of the parish was, annually, on Easter Monday, to elect the two churchwardens for the ensuing year; one of whom was appointed by the vicar, and the other by the parishioners duly assembled in vestry for such purpose.

On Easter Monday, 17th April, 1854, a vestry was convened for the purpose of such election. The vicar presided, and named one person as vicar's churchwarden; and Robert Nicholas Munton and Robert Mawby were *duly proposed and seconded for the office. [*719] The show of hands was declared to be in favour of Munton: a poll was demanded, and held on the following day; to which time the vestry was adjourned, and at which adjourned vestry the vicar presided. Votes were then tendered on behalf of Mawby by seven persons named in the affidavit, who occupied tenements whereof the rateable value did not exceed 6*l.*, and whereof the owners were assessed in the rate of 27th March, 1854. The chairman rejected these votes, and decided that the occupiers of such tenements were not entitled to vote in the election of churchwarden. The seven were all rated to the church-rates made for the parish, and had paid the same. (It did not appear by affidavit, but was assumed in the discussion, that Munton had the majority of votes, and had been declared duly elected; the affidavits were silent as to whether the votes rejected would or would not have altered the result.)

Lush, in support of his motion:

The votes were improperly rejected. * * The parishioners are the parties to elect the churchwarden: 1 Burn's Eccl. L. 401, tit. Churchwardens, iii. They cannot lose their right by *not being rated to the poor rate or highway rate, to which rates alone stat. 13 & 14 Vict. c. 99 (1), applies.

[*720]

(COLERIDGE, J.: I do not see how the question can be raised in this form.

LORD CAMPBELL, Ch. J.: Do you say that the election which has taken place was entirely void?)

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In *Rex v. The Rector, &c. of Birmingham* (1) this Court held that a *mandamus* was the proper mode of questioning the election.

(LORD CAMPBELL, Ch. J.: In that case, the proceedings were such that there appeared not to have been even what amounted to an election *de facto*: you must go so far as to say that the election here would be entirely void if a single vote was improperly rejected.)

That would follow, certainly. No other remedy can be discovered.

(COLERIDGE, J.: Can you not object to the swearing in of the other candidate?

CROMPTON, J.: A *mandamus* has gone in such cases (2) to the archdeacon, commanding him to swear in.)

His duty is to swear in both claimants. The right to vote is temporal. In *Rex v. The Rector, &c. of Birmingham* (1) Lord DENMAN refers to *Rex v. Shepherd* (3), where it was held that no *quo warranto* lay in respect of the office of churchwarden.

(ERLE, J.: Suppose the fact here to be that, even if the votes had been received, Munton would have had the majority.)

The application is made on behalf of the rejected voters as well as of the candidate.

(CROMPTON, J.: Can there be a *mandamus* merely because votes have been improperly rejected, where that has not led to the declaration of a candidate, as duly elected, who would have failed if the votes had been received?

[*721] ERLE, J.: Might you not bring an action for *the rejection of the vote, as in the case of an election of members of Parliament?

CROMPTON, J.: Or suppose the votes tendered and rejected, and the opposing candidate sworn in: might not his acts be resisted, or an action brought for what he may do?

LORD CAMPBELL, Ch. J.:

I do not undertake to say what can be done in this case: but

(1) 45 R. R. 717 (7 Ad. & El. 254).

(3 Ad. & El. 615); *Ex parte Duffield*,

(2) See *Ex parte Winfield*, 42 R. R.

42 R. R. 497 (3 Ad. & El. 617).

494 (3 Ad. & El. 614); *Rex v. The Archdeacon of Middlesex*, 42 R. R. 495

(3) 2 R. R. 416 (4 T. R. 381).

clearly we cannot issue a *mandamus*. That goes on the supposition that what has been done is void: such was the case in *Rex v. The Rector, &c. of Birmingham* (1), where there had been riotous proceedings, and the Court held the supposed election merely void.

Ex parte
MAWNEY.

COLERIDGE, J.:

I agree that this is a safe ground of decision in this case: the election is not shown to be void. It does not appear that the result would have been altered by the admission of the votes. *Mr. Lush* was compelled to contend that the rejection of a single vote would authorize a *mandamus*.

ERLE, J. concurred.

CROMPTON, J.:

It is clear that the mere rejection of votes furnishes no ground for our interfering by *mandamus*, where it does not appear that the election has been vitiated.

Rule refused.

DANSEY v. RICHARDSON.

(3 EL. & BL. 722—723; S. C. 23 L. J. Q. B. 361; 18 Jur. 957.)

Where a rule for a new trial drops, on account of the Court being equally divided in opinion, no costs of the rule are to be allowed to either party.

1854.
May 29.

[722]

IN this case, the defendant at the trial had a verdict. A rule *nisi* for a new trial was granted; but, the Court being equally divided, no order was made; and, in last Hilary Term, the rule dropped (2). On taxation, the Master refused to allow the defendant the costs of the rule for a new trial. MAULE, J., at chambers, made an order that he should review his taxation.

Pearson, in last Easter Term, obtained a rule *nisi* to set aside the order of MAULE, J.

Lush, in the same Term, May 10th (3), showed cause:

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The general rule is that the successful party is entitled to costs.

(LORD CAMPBELL, Ch. J.: That is true; and in the House of Lords,

(1) 45 R. R. 717 (7 Ad. & El. 254).

(3) Before Lord Campbell, Ch. J.,

(2) See *Dansey v. Richardson*, ante, Wightman, Erle and Crompton, JJ.
p. 414.

DANSEY when the Lords are equally divided, the respondent is successful;
 v.
 RICHARDSON. for a decision in his favour is made on the principle *Semper
 præsumitur pro negante*. But, when this Court is equally divided on
 a rule, there is no decision, and no successful party.)

Pearson was heard in support of the rule.

(LORD CAMPBELL, Ch. J. : As the question affects all the Courts, we
 will take time to consider.)

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (May 29th), delivered judgment :

This rule must be absolute. The COURT being equally divided in
 opinion, there was no decision on the rule, and no successful party ;
 and these costs were properly disallowed.

Rule absolute.

1854.
 May 29.

TAYLOR v. NESFIELD.

(3 El. & Bl. 724—730 ; S. C. 2 C. L. R. 1312 ; 23 L. J. M. C. 169 ; 18 Jur. 747.)

[In this case the only point decided was whether the notice of action given
 under the Justices Protection Act, 1848, was a good notice under s. 9 of that
 Act. The section was repealed by S. L. R. 1894, and its provisions are super-
 seded by the Public Authorities Protection Act (56 & 57 Vict. c. 61), ss. 1
 and 2.]

1854.
 May 29.

LANE v. HOOPER.

(3 El. & Bl. 731—733 ; S. C. 23 L. J. Q. B. 372 ; 18 Jur. 652.)

Error having been brought in Parliament upon a judgment of the
 Exchequer Chamber on a record of this Court, this Court, under sect. 155
 of the Common Law Procedure Act, 1852, ordered the Masters to take the
 record itself to the clerk of the judicial department of the House of Lords,
 and leave it with him, taking a receipt, and an undertaking for the return
 of the same when the case should be decided.

[Proceedings in error are now abolished, except in criminal cases, and it is
 therefore thought sufficient in this case to preserve the head-note.]

REG. v. STURGE.

(3 El. & Bl. 734—736; S. C. 23 L. J. M. C. 172; 18 Jur. 1052.)

1854.
May 29.

[734]

On the trial of an indictment charging defendant with obstructing a footway leading from A. to C., it appeared that there was a way leading from A. to C., but that it passed through an intermediate point B., and that the way was a carriage way from A. to B. and a footway only from B. to C. The obstruction was between B. and C.:

Held that, assuming this to be a misdescription, the indictment might, under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 1, be amended at the trial, by substituting a description of the way as a footway leading from B. to C.

THE indictment charged that defendant, on &c., at the parish of Northfleet, in Kent, “in and upon a certain highway there, being a common and ancient public footway, leading, from out of the turnpike road between Dartford in the said county and Gravesend in the said county, towards, unto and over and along a part of the shore of the River Thames called the Hard, in the said parish of Northfleet, and, over and along a certain other part of the said parish of Northfleet, towards, unto and into the town of Gravesend in the said county, used for all the liege subjects of our lady the Queen to go, return, pass and repass, on foot, every year, and at all times of the year, at their free will and pleasure, unlawfully and injuriously did dig” pits and holes, and erect posts and rails, and deposit large quantities of stones &c., and continue, and still doth continue, &c., “in and upon the said common public footway; whereby the said common public footway,” on &c., was and still is obstructed &c., so that the liege subjects could not, on &c., “go, return, pass and repass, in, through, along and over the said footway, as they were before used” &c., and still &c.: to the damage of all the liege subjects “going, returning, passing and repassing over and along the said footway” &c.

Plea: Not guilty. Issue thereon.

On the trial, before Parke, B., at the last Kent Assizes, it appeared that the highway in question led, as described *in the indictment, from the turnpike road between Dartford and Gravesend into the town of Gravesend. Between these termini, it passed over a hill called Orme House Hill; and it appeared that, from the said turnpike road to the top of Orme House Hill, the highway in question was a carriage way; but from thence to the town of Gravesend it was a footway. The alleged obstruction was on the part between Orme House Hill and the town of Gravesend. It was objected, on the authority of *Rex v. St. Weonard's* (1), that this was a

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misdescription. It was contended, in answer, that, if the carriage way was also a footway, there was no misdescription; and, further, that the misdescription, if there was one, was amendable under stat. 14 & 15 Vict. c. 100, s. 1, and that there should be substituted a description of a footway running from Orme House Hill to Gravesend. The learned Judge proposed to direct a verdict for the defendants on this objection, if it should become necessary, reserving leave to move to enter a verdict for the Crown, if it should be considered by the Court either that there was no misdescription, or that it was amendable; to which the counsel on both sides acceded. The case was then left to the jury on the merits; and they found for the Crown. His Lordship then directed that the verdict should be entered for the defendants.

In last Easter Term, *M. Chambers* obtained a rule *nisi* for entering a verdict for the Crown, and for making the amendment.

Bramwell and *Lush* now showed cause:

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The question as to the amendment is, Whether this is a variance in an *indictment, "in the name or description of any matter or thing whatsoever therein named or described," within the meaning of stat. 14 & 15 Vict. c. 100, s. 1. The words of the section are, no doubt, very general; but they must be construed together with the preceding words of the same section; and these relate to names of persons or things, and not to a description referring the subject matter to a class to which it does not belong. This is not a misdescription of a given thing, but a naming of one thing instead of another. It must be admitted that the defendants were not prejudiced in their defence by the misdescription.

W. Rose, contra, was not called on.

LORD CAMPBELL, Ch. J.:

This appears to me to be the very sort of case for which the Legislature meant to provide. It is a variance in the description "not material to the merits of the case;" and "the defendant cannot be prejudiced" by the amendment "in his defence on such merits."

COLERIDGE and ERLE, JJ. (1) concurred.

Rule absolute.

(1) Crompton, J. had left the Court.

WESTBROOK v. BLYTHE.

(3 El. & Bl. 737—742; S. C. 2 C. L. R. 1660; 23 L. J. Q. B. 386; 1 Jur. N. S. 85.)

1854.
May 30.

Ejectment for lands in Middlesex. On a case stated it appeared that A., being possessed of a term for ninety-nine years in the lands, conveyed it by way of mortgage to the plaintiff on 19th June, 1852. The mortgage was registered in Middlesex on 28th June. Defendant, on 5th June, 1852, obtained a judgment in the Queen's Bench against A. On the same day the judgment was registered in the Common Pleas: it never was registered in Middlesex. On 8th September, 1852, an *elegit* issued; and the lands were delivered to defendant:

Held, that the judgment was a charge on lands in general, under stat. 1 & 2 Vict. c. 110, s. 13, from the time it was registered in the Common Pleas, but that, by stat. 2 & 3 Vict. c. 11, s. 5, it had no further effect against a *bonâ fide* purchaser, for value and without notice, than a docketed judgment before stat. 1 & 2 Vict. c. 110. That a docketed judgment would not, before that Act, have bound a term for years until execution; and consequently that the plaintiff, being a *bonâ fide* purchaser of his term of years before the execution, was entitled to the lands as against the defendant, the judgment creditor.

Held also that, these lands being in Middlesex, the judgment, though registered in the Common Pleas, did not bind the lands till a memorial was registered in Middlesex under stat. 7 Ann. c. 20, s. 18.

For both reasons plaintiff had judgment.

[This case seems now of no importance. The 7 Anne, c. 20, s. 18, was repealed by 54 & 55 Vict. c. 64, s. 6; and since 1864 no judgment has operated to bind lands until delivery in execution. As to registration of executions, see 51 & 52 Vict. c. 51, ss. 5 and 6; 63 & 64 Vict. c. 26, ss. 2 and 3. The head-note is however, preserved, *ex abundanti cautela*.]

WATTS v. PORTER (1).

(3 El. & Bl. 743—763; S. C. 2 C. L. R. 1553; 23 L. J. Q. B. 345; 1 Jur. N. S. 133.)

1854.
June 12.
[743]

A., an attorney, employed by B. to invest money, lent it to C. on an agreement, by which C., as a security, charged his interest in 5,000*l.* Consols, standing in the names of trustees in trust for C. A. neglected to give notice to the trustees. A judgment creditor of C., subsequently to this loan, obtained a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, notice of which was given to the trustees. C. obtained the benefit of the Insolvent Act. B. brought an action against A. for negligence: on the trial, the Judge directed the jury, in estimating the damages, to consider that, as no notice had been given to C.'s trustees of the charge in favour of B., the subsequent charge created by the Judge's order had priority over it.

On a rule for a new trial:

Held by Lord CAMPBELL, Ch. J., WIGHTMAN, J. and CROMPTON, J. that

(1) Cited, *Gill v. Continental Gas Co.* Whitehouse (1886) 32 Ch. D. 512, 515, (1872) L. R. 7 Ex. 332, 338, 41 L. J. 55 L. J. Ch. 608, 54 L. T. 898; *In re Ex. 176, 27 L. T. 428; Punchard v. Leavesley* [1891] 2 Ch. 1, 60 L. J. Ch. 385, Tomkins (1882) 31 W. R. 287; *Ex parte* 64 L. T. 269. See also *post*, p. 732, note.

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the direction was correct, and that the judgment creditor had the same rights as a subsequent incumbrancer without notice, and was, therefore, to be preferred in equity to A. (1).

ERLE, J. *dissentiente*, and holding that the judgment creditor had only those remedies which affected what, at the time of the charging order, remained the property of the judgment debtor.

THE following abstract of the pleadings and facts in this case is taken from the judgment of Lord CAMPBELL, Ch. J., before whom the cause was tried at the Westminster sittings after last Hilary Term.

“The declaration alleged that the plaintiff Elizabeth, while sole, paid to defendant, as a solicitor, 8,700*l.*, to be invested at interest, on good security; and that he, wrongfully, advanced the money to one Theodore Williams on bad security; whereby it became lost to the plaintiffs. Pleas: 1. Not guilty; 2. Denying the retainer. At the trial, it was proved that the money had been paid to the defendant, as a solicitor, in the manner alleged; and a clear case of negligence was made out against him. On the 10th of January, 1844, he advanced 2,000*l.* of the money to the Rev. Theodore Williams, on an agreement bearing date that day, and signed by Williams, purporting to be between him and the plaintiff Elizabeth (then Elizabeth Davis), which, after reciting that Joseph Williams, by his will, having bequeathed certain annuities and made other pecuniary bequests, had devised and bequeathed all the residue of his estate, real and personal, *to trustees for the benefit of his brother, the Rev. Theodore Williams, and that, after his death, the trustees set apart the sum of 5,000*l.*, which was standing in their names in the books of the Governor and Company of the Bank of England, to provide for the payment of the annuities, declared that the said sum of 5,000*l.*, so standing in the name of the trustees, to which Theodore Williams would be entitled on the death of the annuitants, should be charged as a security for the said sum of 2,000*l.* and interest. Subsequently, by an undated memorandum written on this agreement, which Theodore Williams signed, he further charged all his interest, under his brother's will as residuary legatee, with the further sum of 1,700*l.* advanced to him on behalf of Elizabeth Davis. The defendant prepared the agreement and memorandum, but never gave any notice of the charge to the trustees, because, as he said, he considered it was only a temporary

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(1) Overruled: *Robinson v. Nesbitt* L. T. 750; *Kinderley v. Jarvis* (1856) 25 L. J. Ch. 538; *Beavan v. Oxford* C. P. 124, 17 L. T. 653; *Pickering v. Ilfracombe Rail. Co.* (1868) L. R. 3 299.
C. P. 235, 37 L. J. C. P. 118, 16

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loan. On the 31st May, 1847, James Garden and Alexander Urquhart recovered a judgment in the Court of Queen's Bench against Theodore Williams, for 8,665*l.*; and, on the 27th May, 1848, at their instance, an order was granted by my brother WIGHTMAN, under stat. 1 & 2 Vict. c. 110, s. 14, charging the 5,000*l.* standing in the names of the trustees with the judgment debt. This order was regularly entered on the books of the Bank of England, in which the stock stood; and express notice was given of the order to the trustees. The judgment remains wholly unsatisfied. And, in 1853, Theodore Williams was discharged by the Insolvent Debtors' Court, no part of the 3,700*l.* having been repaid, no interest having been paid upon it for some years, and there being no dividend for his creditors. At the trial, the Judge directed the *jury, in estimating the damages, to consider that, as no notice had been given to the trustees of the charge in favour of Elizabeth Davis, the charge created by the Judge's order in favour of the judgment creditors, of which notice had been given to the trustees, would have priority over it."

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In last Easter Term *Bramwell* obtained a rule *nisi* for a new trial, on the ground of misdirection.

In the same Term (1), *Manisty* and *Hannen* showed cause, and *Bramwell* and *Willes* were heard in support of the rule.

The arguments are so fully stated in the judgments as to render any further report unnecessary.

Cur. adv. vult.

There being a difference of opinion, the following judgments were, in this Term (June 12th), delivered *seriatim*.

LORD CAMPBELL, Ch. J., after stating the pleadings, and the facts, as *ante* at p. 732, proceeded as follows:

A rule was granted to show cause why there should not be a new trial for misdirection on this point. But, after much deliberation, my brother WIGHTMAN, my brother CROMPTON and myself are of opinion that the rule should be discharged.

Our decision turns upon the construction of sect. 14 of stat. 1 & 2 Vict. c. 110, by which it is enacted: "that if any person against whom any judgment shall have *been entered up in any of her Majesty's Superior Courts at Westminster shall have any

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(1) Before Lord Campbell, Ch. J., Wightman, Erle and Crompton, JJ.

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Government stock," &c. "standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock," &c., "shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." By the order the stock is to stand charged with the payment of the money recovered by the judgment; and it is to have the same effect as if such charge had been made, in favour of the judgment creditor, by the judgment debtor. If, at the time of the order, a charge had been given on the fund by the judgment debtor, in favour of the judgment creditor, the judgment creditor having no notice of any previous charge, and he had given notice of his charge to the trustees, independently of the statute, it would have had priority over the previous charge created in favour of Elizabeth Davis, of which no notice had been given to them. But, by the statute, the Judge's order is to be a charge upon the stock as if a charge had been given by an instrument which the debtor had himself signed; and the remedies upon it are the same.

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A charge so given by the debtor to a creditor, without notice of any previous charge, if notice of it be served upon the trustees, would certainly be preferred to a *previous equitable charge of which the trustees had no notice. It is the notice, only, which establishes any privity between the trustees and the party in whose favour the charge is given: by such notice, only, is the security completed: when it is given, the trustees become trustees for the party in whose favour it is given: and, till this charge is satisfied, they can apply no part of the fund to satisfy the demand of a party who had obtained a prior equitable charge of which they had subsequent notice.

The defendant contends that the statutable proceedings, specified by sect. 14 of the Act, is of the same nature as an execution, allowing the debtor's equitable interest to be taken to satisfy the judgment; and that it can only be taken, subject to any prior equitable charge created, although that charge has not been perfected by notice to the trustees. But we think that this would be doing

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violence to the language of the Legislature, which puts the judgment creditor, who has obtained the charging order, in the same situation as if he had, at that moment, obtained an instrument, executed by the judgment debtor, creating the charge. Having given notice of it to the trustees, and having had no notice of the former charge, he would, under these circumstances, before the statute 1 & 2 Vict. c. 110, passed, have been preferred to the prior incumbrancer. This doctrine, which without any express decision upon the subject had long been recognised, was at last solemnly established in the two cases of *Dearle v. Hall* and *Loveridge v. Cooper* (1), which came on together before Sir Thomas Plumer, Master of the Rolls.

There a person having a beneficial interest in a sum of money, invested in the names of trustees, assigned it for valuable consideration to A., but no notice of the assignment was given to the trustees; afterwards, the same person sold his interest to B., who, without notice of any prior incumbrance, paid the purchase money, completed the purchase and gave notice to the trustees: Held that B. had a better equity than A. to the possession of the fund, and that the assignment to B., though posterior in date, was to be preferred to the assignment to A. The reason of the decision (which is equally applicable to the case at Bar) is thus luminously expounded by the learned Judge. "Where a contract, respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business of the party advancing the money, is responsible for that neglect." "These inconveniences and mischiefs are the natural consequences

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(1) 27 R. R. 1 (3 Russ. 1).

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of omitting to give notice to trustees ; and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice ; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty : and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title ; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons." This decision was affirmed, upon appeal, by Lord Chancellor LYNDHURST, who entirely approved of the reasoning of the MASTER OF THE ROLLS, and added : " In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund : it is going as far towards equitable possession as it is possible to go ; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

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Such being the rights of contending incumbrancers independently of stat. 1 & 2 Vict. c. 110, when one of them is a judgment creditor, who has obtained a charging order under that statute, his rights must depend entirely on the construction of the statute ; and this construction must be the same in a court of law and in a court of equity. Every tribunal, administering justice *according to the statute, must consider only the effect intended by the Legislature to be given to the charging order ; and this is to be learned from the language in which the meaning of the Legislature is expressed, without interpolating something not to be found. In the 14th section, it gives, in the most unequivocal terms, the same remedies to the judgment creditor, who has obtained the charging order, to which he would have been entitled " if such charge had been made in his favour by the judgment debtor." The defendant's counsel contended that we are bound to understand the word " honestly " to be implied, and that the charging order is only to have the effect which a charge of the debtor would have had, if made honestly. To interpolate the word " honestly " would, we think, be a qualification of the enactment wholly unauthorized. The words, that are to be understood as implied by the Legislature, we think, are " validly and effectually." The debtor could not validly and effectually make a charge, to have priority over an antecedent equitable charge to which the incumbrancer has completed his title : and therefore the charging order has no such operation : but, the first incumbrancer not having completed his title by notice to the trustees, the debtor

might make a charge to a subsequent incumbrancer, which in point of law would be valid and effectual. At the time of this charging order, the stock still continued to stand in the name of the trustees, in trust for Theodore Williams; till notice from Elizabeth Davis, they were not trustees for her; and, immediately after notice of the charging order, they became trustees for the judgment creditor. At the expiration of six months, the judgment creditor might have proceeded against them in a court of equity. It is *difficult to see how, after such a proceeding, Elizabeth Davis could have intervened, or made her claim available. It is not contended that the trustees can be liable both to her and the judgment creditor.

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Our construction of the statute throws no hardship whatever upon the person who obtains the first equitable charge; for, if he uses due diligence and gives immediate notice to the trustees, his title is complete and absolutely secure; and he has nothing to apprehend from a charging order afterwards obtained by a judgment creditor, any more than from a subsequent equitable charge voluntarily created by the debtor: whereas the contrary construction seems to have a tendency to encourage *laches* on the part of the first incumbrancer, and, by keeping the trustees in ignorance of charges created on the fund, to enable the cestui que trust to commit frauds on subsequent incumbrances. The first incumbrancer may suffer (as Elizabeth Davis does) by the negligence of a solicitor in not giving notice to the trustees: but for this the law gives a remedy by action against the solicitor, in which damages are to be recovered commensurate to the loss sustained. The defendant's counsel mainly relied upon the great case of *Whitworth v. Gaugain* (1), which was decided by that very eminent Judge, Vice-Chancellor WIGRAM, was affirmed on appeal by Lord Chancellor COTTENHAM, and was approved of by Lord St. LEONARDS when Lord Chancellor of Ireland. To the authority of that case we implicitly bow; and we entirely concur in the reasoning on which the decision proceeded. An equitable *mortgagee of lands, who has completed his equitable title, is to be preferred to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of *elegit*. There, certain bankers, in consideration of an existing debt, and of a farther

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(1) 64 R. R. 365 (1 Phillips's Ch. R. WIGRAM, V.-C. in *Whitworth v. 728*), affirming the judgment of *Gaugain*, 64 R. R. 358 (3 Hare, 416).

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advance of money to a customer, obtained from him a deposit of all the title deeds of certain freehold and copyhold lands of which he was seised, with a written memorandum, signed by him, regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgments against him, and, under sect. 18 of stat. 1 & 2 Vict. c. 110, sued out *elegits*, under which the sheriff delivered to them the whole of the lands. The bankers having filed a bill in Chancery, praying that they might be declared to have an equitable mortgage upon the lands, and to be entitled to priority over the *elegits* and judgments, they prevailed. But why? Because they would have been preferred to the judgment creditors, if, at the time when the judgments were recovered, the person against whom the judgments were recovered "had by writing under his hand agreed to charge" the lands with the amount of the judgment debts. The *elegits* were allowed to have the same operation, and no more. But there was no *laches* on the part of the equitable mortgagees: and, before the judgments were recovered, their equitable title was perfect. WIGRAM, V.-C. considered that the memorandum, coupled with the debt and the deposit of the title deeds (1), "created as perfect an equitable charge as intention and act can possibly create;" that, from that *time, the mortgagor became trustee for the mortgagees; and that, under an execution against him on judgments subsequently obtained, the judgment creditors could not take for their own benefit that which was in truth the property of the cestui que trusts. Lord COTTENHAM, in affirming the decree, observed that (2) "by the equitable mortgage the plaintiffs acquired a special lien upon the property;" and that they had as strong an interest as if a mortgage had been executed. Proceeding on the ground that the title of the equitable mortgagees was complete, he held that they must have been preferred to the judgment creditors, independently of the statute; and that, although under the statute the judgments operated as a charge upon all the lands, it must be taken as a charge subsequent to the charge before created by the equitable mortgage. Indeed such effect is given to a perfected equitable mortgage that, in *Casberd v. Attorney-General* (3), it was allowed to prevail against an extent at the suit of the Crown. But, in the case at Bar, on account of the gross negligence of the defendant, the equitable title of Elizabeth Davis had not been completed before the charging order, and notice

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(1) 64 R. R. 361 (3 Hare, 424).

729).

(2) 64 R. R. 365 (1 Phillips's Ch. R.

(3) 20 R. R. 671 (6 Price, 411).

of it to the trustees. She has an equity, as against Theodore Williams, the mortgagor; but, in competition with the judgment creditors, who have a charge upon the fund and have perfected their title to it, hers is not an equal equity: she had acquired no right, legal or equitable, in the property; and, there being no privity between her and the trustees, she could only proceed against Theodore Williams, her debtor, *in personam*.

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In our researches upon this important subject, we have found two recent cases which were not cited at the Bar, but which are well entitled to our deliberate consideration before we pronounce judgment.

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The first is *Brearcliff v. Dorrington* (1), before Vice-Chancellor Knight Bruce. A testator left real and personal property to trustees, to be sold and divided among children. One of the children, by assignments for valuable consideration, created charges on his portion; and notice of each of these assignments was, immediately after its execution, given to the trustees of the will. A judgment was recovered against the assignor. A sale was ordered of the real estates; and the proceeds were vested in the Three per cents.: the judgment creditor obtained a charging order, under stat. 1 & 2 Vict. c. 110, s. 14, upon the share of the assignor. The question then arose, Which should be preferred, the assignees or the judgment creditor? The VICE-CHANCELLOR decided (we think most properly) in favour of the assignees. They had perfected their equitable security long before the charging order; and a new charge, then created by the debtor, could not have affected their securities. If the parties had equal equities, priority of date was to determine the preference between them.

The case came exactly within the principle of *Whitworth v. Gaugain* (2). But the VICE-CHANCELLOR is reported to have said *obiter* (3): "I doubt very much whether" the judgment creditor "is entitled to all the same rights as if he had been a purchaser by particular *contract for value. He is not in this situation." He claims under stat. 1 & 2 Vict. c. 110, s. 13. "I doubt whether this provision enables him to obtain more than his debtor had at the time fairly to dispose of. I do not, however, think it necessary to decide the point." Unfortunately the very learned Judge does not at all state on what his doubts rested, or how he thought

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(1) 87 R. R. 318 (4 De G. & Sm. 1 Phillips's Ch. R. 728).
122).

(3) 87 R. R. 319 (4 De G. & Sm.

(2) 64 R. R. 358, 365 (3 Hare, 416; 123).

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that this construction could be put upon the language of the statute.

A still later case is *Dunster v. Glengall* (1), before the Master of the Rolls in Ireland. His Honour there decided that an equitable mortgagee, by deposit of railway shares, is entitled to priority over a prior judgment creditor, who, subsequently to the mortgage, has obtained an order charging the shares. We entirely concur in this decision; but we cannot concur in the reason given for it by the learned Judge. On 22nd May, 1848, Dunster recovered a judgment against Lord Glengall. In Easter Term, 1849, Sargeant recovered a judgment against him; and Lord Glengall deposited with Sargeant, by way of collateral security, the certificates of twenty shares which he held in the Waterford and Limerick Railway Company, and, at the same time, signed a memorandum by which he declared that the shares were deposited as an equitable mortgage, and that he charged the shares with the sum due on the judgment. On 2nd June, 1851, an order was granted, and served on the Railway Company, charging the shares with the sum due to Dunster on his judgment. It did not appear that Sargeant had given notice to the Company of his security. Nevertheless there seems no doubt that Sargeant was entitled to priority. No *notice to the Company was necessary to complete his security. Notice is only required when a charge is to be created by way of equitable mortgage on an equitable interest, and where there are trustees in whom the legal estate is vested. The shares belonged to Lord Glengall; and the Company were not bound to attend to any equitable assignment he might make of them, or any incumbrance he might create upon them. Here, as in *Whitworth v. Gaugain* (2), the equitable security of Sargeant was complete by the deposit and the memorandum. It could not have been prejudiced by a subsequent charge created by Lord Glengall, of which notice was given to the Company; and therefore it could not be prejudiced by the subsequent charging order. Nevertheless his Honour, the MASTER OF THE ROLLS, is reported (3), in deciding in favour of Sargeant, to have considered the doubts of Lord Justice KNIGHT BRUCE as a deliberate opinion that the judgment creditor, who obtains a charging order, can obtain no more under it "than his debtor had at the time fairly to dispose of;" and to have rested his decree upon that opinion. After citing the passage from the judgment in

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(1) 3 Irish Chan. Rep. 47.

1 Phillips's Ch. R. 728).

(2) 64 R. R. 358, 365 (3 Hare, 416;

(3) 3 Irish Chan. Rep. 56.

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Brearclyff v. Dorrington (1) above mentioned, his Honour proceeds as follows: "It appears to me that the opinion thus expressed by Sir KNIGHT BRUCE is correct, and that Lord Glengall having, by the letter of the 2nd February, 1851, granted an equitable charge on the shares, his judgment creditor did not obtain by the charging order more than Lord Glengall had at the time fairly to dispose of. I shall therefore affirm the Master's order." *According to this doctrine, we ought to decide in the present case in favour of the defendant; for, when the judgment creditors obtained the charging order, Theodore Williams could only have fairly disposed of his interest in the stock standing in the names of the trustees, subject to the prior charge in favour of Elizabeth Davis, although he might have created effectually a valid charge in favour of a subsequent incumbrancer who gave notice to the trustees. But, with the most sincere respect for those with whom we differ, we are bound to say, for the reasons we have given, that this doctrine does not appear to us to carry into effect the expressed intention of the Legislature. It must be borne in mind that, when the remedy against the person of the debtor was greatly abridged, the object of stat. 1 & 2 Vict. c. 110, was, not only to make the judgment attach on property not before bound by it, but also, by means of an order to be obtained from the Court, or a Judge, to give the creditor the advantage of an express charge, attended with peculiar incidents. Among these, is a delay of one year before the creditor can seek to obtain the benefit of a charge, created under sect. 13, and of six months before he can seek to obtain the benefit of a charge created under sect. 14. Therefore the authorities collected in 5 Bacon's Abridgment, p. 662, Mortgage (E) 3, to which we were referred, and the rules respecting what may be taken in execution under a judgment, and the respective rights of judgment creditors without any specific charge, and others with a specific charge, on the property taken in execution, cannot govern us. It appears to us that the Legislature has placed the judgment creditor, who has obtained the charging order, exactly in the same situation as if the debtor had at that *time signed an instrument, giving him a charge upon the fund: and, in the absence of any unfairness on the part of the judgment creditor, it is wholly immaterial to him whether the debtor, if he had created this charge, would have acted fairly or unfairly to other creditors. We have only further to remark that we put exactly the same construction on the 13th and on the 14th sections of stat. 1 & 2

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Vict. c. 110, which are both framed on the same principle, so as in extending the rights and remedies of judgment creditors to protect all prior interests and charges, which have not been left defective by the *laches* of those in whose favour they were created. For these reasons we think that, in this case, the damages, arising from the defendant's negligence, were properly estimated, upon the supposition that the plaintiffs could have no claim to the fund in question till the charge of the judgment creditors is satisfied: and that the verdict ought not to be disturbed.

ERLE, J.:

Upon this rule, the question raised was, Whether the order of a Judge, charging stock, standing in the name of a trustee in trust for the judgment debtor, with a judgment debt, gave priority to the judgment creditor over a prior mortgagee of this stock; the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. The answer depends upon stat. 1 & 2 Vict. c. 110, s. 14, giving to a judgment creditor with a charging order all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.

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For the affirmative, it was contended that, if the *creditor had received a charge from the debtor, and had given notice of it to the trustee, without having notice of the mortgage, he would have had priority over the mortgagee; and that the giving of such notice was a remedy he would have been entitled to: therefore a judgment creditor, with a charging order, is said to be entitled to the same remedy.

For the negative, it was contended that the remedies intended by the statute were remedies, against the debtor, which would make his interest in the stock available for payment of the debt, and which would arise upon a lawful charge, made by him in favour of the creditor.

The debtor's interest only is charged; for the condition in the statute for the charge is, that there should be stock standing in the name of a trustee, in trust for the debtor; now, if the debtor has already assigned the stock, without notice to the trustee, it is not standing in trust for him, but in trust for the assignee, at least as between these parties. The assignee could at any time compel the trustee to transfer the stock to him: and neither the debtor

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nor the trustee could resist the claim of such assignee on the ground that he had given no notice to the trustee: and what is true of an assignment of the whole stock is true of a partial charge thereon. It is admitted that this would be the effect of the charging order upon stock standing in the debtor's name, and equitably mortgaged by him before the charging order. The equitable mortgagee would have priority; for the debtor would be trustee of the stock for him, and the stock would not be standing in his name on his own behalf. It is not probable that the Legislature intended to give a greater effect to the *order upon stock standing in the name of a trustee than it would have upon stock standing in the debtor's name.

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Also the charge, intended by the statute, must be taken to be a lawful charge; for it is not to be supposed that the Legislature intended to force the debtor into the situation of a breaker of the law. Now, if the debtor made a lawful charge on stock, he would either specify his interest therein or charge it subject to outstanding incumbrances. The compulsory charge by a judgment creditor is analogous to a charge expressed to be on such interest as the debtor might have; and, if worded in that way, the charge would give no right, beyond what the debtor had, as a charge so worded seems to be notice, to the creditor taking it, to inquire. The second charge would not take priority over the first, unless the debtor charged, as unincumbered, that which was incumbered; if he did so, he would clearly violate the law, so far as to be liable to an action of tort for the damage arising from the false representation. If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence. The judgment creditor therefore would not be entitled to priority over the first mortgagee if the charge intended in sect. 14 is a lawful charge.

Furthermore, the claim to take the stock from the first mortgagee is not a remedy against the debtor, for he has lost the stock in any event, but a remedy against the first mortgagee, a remedy given upon the general principle for deciding which of two innocent claimants shall suffer by the fraud of a third party, namely he who facilitated the fraud. Such is the doctrine of **Loveridge v. Cooper* (1). Now a judgment creditor is in no analogy with a second mortgagee who has been deceived into taking, as unincumbered, a security that was incumbered. The judgment creditor

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has trusted to no particular security: he has rights, which may be made to charge all the available assets of the debtor, and, among the rest, his stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof: and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of any fraud. The reason therefore, for giving priority to a second mortgagee over the first, wholly fails in respect of a judgment creditor.

The previous sections making other assets available for execution, and creating a charge thereon, by registering the judgment, are *in pari materiâ*, and closely analogous to the section in question; no reason can be assigned why a charge, created on stock by sect. 14, should be a charge to a greater extent, or entitling to any other right under the name of remedy, than the charge on interests in land created by sect. 13. By sect. 13 the registered judgment is to entitle to the same remedies as if the debtor, having power to charge, had agreed to charge. There the charge is confined to the power which the debtor had, and does not extend to the possibility of interest which a fraudulent mortgagor may give rise to by granting a second mortgage without notice of the first, in which case no interest passes from the mortgagor. The authorities support this view. In *Brearcliff v. Dorrington* (1) Vice-Chancellor KNIGHT BRUCE expresses an opinion that sect. 13 enables the debtor to charge so much, only, as he could fairly dispose *of. *Dunster v. Glengall* (2) is a decision accordingly by the MASTER OF THE ROLLS in Ireland. In *Johnson v. Holdsworth* (3) Vice-Chancellor Lord CRANWORTH, speaking of sect. 13, says, as well since stat. 1 & 2 Vict. c. 110, as before, a judgment is an equitable lien on what could be taken by *elegit*; and assets equitably mortgaged could not be taken by *elegit*. In *Hawkins v. Gathercole* (4) the intention of the Legislature, in 1 & 2 Vict. c. 110, is said to have been, to create a charge in all property which by any process of execution could be made available for the judgment creditor; which indicates the same limit. In *Whitworth v. Gaugain* (5) the judgment creditor is held not to have the right of a purchaser for value without notice as against a former equitable mortgagee. In *Fury v. Smith* (6), cited in Sugden On

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(1) 87 R. R. 318 (4 De G. & Sm. 6 D. M. & G. 1. 122).

(2) 3 Irish Chan. Rep. 47.

(3) 89 R. R. 39 (1 Sim. N. S. 106).

(4) 1 Sim. N. S. 63, 74. Reversed,

(5) 64 R. R. 358, 365 (1 Phillips's Ch. R. 728; 3 Hare, 416).

(6) 1 Hud. & Bro. Irish Reports,

735.

Vendors and Purchasers, 3rd vol. p. 362 (10th ed.) (1), it was held that the judgment creditor could not take a term, by *elegit*, against a prior mortgage thereof, by an unregistered deed, in a registered county. In *Langton v. Horton* (2) the distinction is taken that an equity, imperfect as between two mortgagees, may be perfect as between mortgagor and mortgagee; and, if the judgment creditor has the rights of the judgment debtor, an equity perfect against the debtor is perfect against the judgment creditor. Upon this review, the arguments for the negative appear to me to preponderate. And, upon the words of the statute, the authorities, and the reason for *the law, I am of opinion, that a judgment creditor with a charging order on stock does not become entitled to it, against a prior mortgagee, although he has given no notice of his mortgage to the trustee of the stock. If that be so, the direction was wrong, and the rule for a new trial should be absolute.

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Rule discharged.

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(3 EL. & BL. 763—778; S. C. 24 L. J. M. C. 45.)

1854.
May 31.

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The justices of the county of L. made rules for regulating the payment of expenses attending the gaol, by which the gaoler's expenses were to be certified by two visiting justices, and then paid by the county treasurer. It was the custom to allow refreshments at the Sessions, and other meetings on county business, held at the Court-house in the gaol, and to charge them as part of the expenses of the gaol. A public inquiry, not connected with county business, was held at the Court-house. Refreshments were furnished to those who attended, including some of the magistrates and their friends who took no part in the inquiry; the two visiting justices directed them to be paid for by the treasurer; which was done. At the ensuing annual Sessions in September, this payment was disallowed in the treasurer's accounts; and the accounts, so altered, were transmitted to the Home Office, under stat. 15 & 16 Vict. c. 81, s. 50 (4). Subsequently, at an adjourned annual Sessions in the ensuing year, this disallowance was rescinded, and the payment allowed. There was a standing order at Sessions that notice should be given before any motion was made for altering or rescinding any resolution of the Court; but no notice had been given on this occasion.

The orders of Sessions having been brought up by *certiorari*, and a rule granted to quash so much as allowed this payment:

Held, that the Sessions had no power to allow a sum already disallowed at a former Sessions: that the payment of the expenses of what was not connected with county business was illegal; and that the former Sessions were bound to disallow it: and that the direction of the visiting justices

(1) P. 978, 11th ed.

(2) 58 R. R. 185 (1 Hare, 549).

(3) Applied, *Att.-Gen. v. De Winton*

[1906] 2 Ch. 196, 75 L. J. Ch. 612.

(4) Repealed: S. L. R. 1892.

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was not a judicial order which the treasurer was bound to obey. And the rule was made absolute to quash so much of the order as was complained of.

Held, also, that it was not necessary to include the direction of the visiting justices in the return to the *certiorari*.

SIR F. THESIGER, in last Term, obtained a rule calling on the prosecutors to show cause why the orders or resolutions made by the justices of the County Palatine of Lancaster, at the Court of annual Session of the peace on 30th June, 1853, whereby it was resolved "that the sum of 53*l.* 7*s.* 6*d.*, part of an order of two magistrates, paid by the county treasurer, be allowed him in his accounts," should not be quashed.

[764] The order had been brought up by *certiorari*, on the affidavit of W. A. F. Saunders, Esq., a justice of the County Palatine, from which the following facts appeared.

In November, 1851, an inquiry was instituted by the Earl of Carlisle, then Chancellor of the Duchy of Lancaster, into the conduct of William Ramshay, Esq., Judge of the County Court of Lancashire holden at Liverpool. The inquiry was conducted at Preston in Lancashire. The visiting justices of the house of correction at Preston made an order, granting the use of the Sessions Court-house at Preston for the purposes of the inquiry. By the proceedings great numbers of persons were attracted to the Court, including several justices of the county, their families and friends. The inquiry continued several days: and, at the instance of some of the justices who attended the Court, wine and other refreshments were supplied to them and their families, and other persons present. The amount, which was 53*l.* 7*s.* 6*d.*, was paid by the county treasurer out of the county rates, under an order of two visiting justices of the house of correction at Preston: and this formed part of an item of 287*l.* 2*s.* 3*d.*, which was charged by the treasurer, in the Preston house of correction accounts, as "Sessions Expenses." At a General Session holden by adjournment at Preston on 9th September, 1852, the treasurer's account being laid before the justices, it was resolved: "That the sum of 53*l.* 7*s.* 6*d.*, part of the sum of 287*l.* 2*s.* 3*d.*, charged as Sessions Expenses in the Preston house of correction accounts, be disallowed;" and "That, subject to the disallowance of the said sum of 53*l.* 7*s.* 6*d.*, *the said accounts be, and they are hereby, allowed accordingly."

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The sum so disallowed was the sum paid by the treasurer for refreshments. An abstract of the county accounts, so allowed

with the said exception, was afterwards transmitted by the clerk of the peace to the Secretary of State for the Home Department; and a copy laid by him before Parliament. The affidavit set forth motions made, after due notice given, at successive adjourned annual general meetings of the Sessions, down to and including a Session holden on 6th April, 1853, for rescinding the disallowance of the 53*l.* 7*s.* 6*d.*; none of which was successful. By a standing order adopted at an adjourned annual Session holden on 10th April, 1850, it was provided: "That no proceedings or resolution of the Court shall be altered or rescinded, otherwise than by a motion, of which previous notice shall be given and inserted in the summons sent to each justice of the county." In the summons sent for the annual Sessions holden on 30th June, 1853, the following notice of motion appeared: "That the county treasurer be instructed to apply, through the deputy clerk of the peace's office, to the Court of Queen's Bench, for a *mandamus* against this Court, to show cause why it has refused to pass his accounts for the year ending May, 1852, he having paid them according to the orders of this Court, the same having been audited and found correct by the auditor and general finance committee." The motion was put and seconded; but an amendment was put, and seconded, * "That the sum of 53*l.* 7*s.* 6*d.*, part of an order of two magistrates paid by the county treasurer, be allowed him in his accounts." This amendment was opposed by Mr. Saunders, but was carried by a majority of the magistrates present; and a resolution in those terms was entered in the book of the Sessions. At the adjourned annual Session holden on 8th December, 1853, Mr. Saunders, in pursuance of notice previously given, moved that the amendment was in violation of the standing order, and that the resolution entered was void. The motion was seconded; but the chairman refused to put it. Mr. Saunders further deposed that he had always opposed the allowance of the 53*l.* 7*s.* 6*d.*

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The return to the *certiorari* included the order of 30th June, 1853, the accounts of the county treasurer as far as related to the houses of correction at Preston and Kirkdale, and the proceedings at the Sessions holden on 9th September, 1852. The order of the visiting justices, of 28th September, 1851, after mentioned, was not returned.

C. M. Wilson, the county treasurer, made affidavit in opposition: in which he deposed that there was no house of correction for Lancashire maintained out of the county rate, and that the houses

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of correction at Preston and Kirkdale were maintained out of a distinct rate, levied, not on the county at large, but on five hundreds thereof, Lonsdale, Amounderness, Blackburn, Leyland and West Derby, and were used as such houses of correction for those five hundreds only. That the rates for maintaining the house of correction at Preston had, by ancient usage, been assessed by the justices, in Quarter Sessions, until the establishment of a general *annual Session in 1798 (1), and, since then, by such annual Session. That, until 1845, these rates were payable to the treasurer of the house of correction at Preston, who was distinct from the treasurer of the county. That, at the annual January Session, held by adjournment on 22nd May, 1845, it was resolved by the justices that, on and after 24th June then next, the duties, offices, authorities and functions of all treasurers in the county, except the treasurer for the lunatic asylums, be transferred to, vested in, and executed by, the county treasurer. And that, after the day last mentioned, the rates for the maintenance of the house of correction at Preston were made payable to the county treasurer. That separate accounts were kept of them, distinct from those of the general county rates. “That, for a long series of years, the Quarter and General Sessions of the peace for the county of Lancaster have been held, originally or by adjournment, at the Court-house in Preston, within and forming part of the house of correction there; and the business arising within the several hundreds of Amounderness, Blackburn and Leyland has usually been transacted at the said Sessions holden at Preston; and the expenses attending the holding of such Sessions have been charged as part of the expenses of maintaining the said house of correction.” “That, for a series of years past, the business at Preston Sessions has been heavy;” and “that the Court of Sessions, in order to expedite the business, generally sits until a late hour of the day. That, in order to do this, it is found necessary to allow the justices, jurors and witnesses a short time in the middle of the day to take refreshment; *and that, in order to save all unnecessary delay, it has been long found more expedient and economical to provide such refreshments for the justices and jurors in or close to the Court-house than to leave them to seek it for themselves in the town at a distance; the cost whereof has been charged under head of Sessions Expenses, and has been included in the charge of maintaining the said house of correction.” “That it has been long customary, at

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(1) Stat. 38 Geo. III. c. lviii., local and personal, public. See sect. 2, &c.

meetings of the justices on magisterial business in the said Court, whenever the said meetings lasted beyond the middle of the day, to provide refreshment as lunch for the justices attending the meetings." That on 7th July, 1851, certain rules were settled by the visiting justices of prisons, in conjunction with the general finance committee and the treasurer of the county, to regulate the payment of moneys by the treasurer for the services of the gaols and houses of correction at Preston and other places, in accordance with a resolution of the Court of annual Session holden on 27th June, 1850.

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The affidavit set out these rules, of which the 3rd and 6th were as follows :

" 3. That estimates of the pay required for the servants of the gaols and houses of correction, and for contingencies, be prepared monthly by the governors, signed by them, certified by two visiting justices, or the chairman of their committee, and then transmitted by the governors to the treasurer of the county. The governors to obtain weekly orders, signed by two visiting justices, for the amounts (the last to include extra days), on the county treasurer, who shall make arrangements that the same be paid by the county bankers or their agents when presented."

" 6. Bills for all articles and provisions furnished to the gaols or houses of correction, and for repairs, alterations and contracts, to be discharged within each quarter: the quarters for this purpose to terminate on the 24th day of August, the 24th day of November, the 24th day of February, and the 24th day of May. Separate orders for each tradesman or contractor upon the county treasurer being obtained by the governors, and handed over to the proper parties, the same to be paid by the bankers in like manner as the orders for salaries" &c. * * *

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In 1851, the Chancellor of the Duchy of Lancaster, for the purpose of the inquiry before mentioned, applied to the visiting justices of the house of correction at Preston for the use of the Court-house. The said justices, at a meeting holden on 1st November, 1851, came to the following resolution: " That the use of the Court-house be granted to the Chancellor of the Duchy, on the 5th instant and following days; and that the governor be directed to make all necessary arrangements."

The treasurer deposed that " such resolution, as this deponent is now informed and verily believes, was intended and understood by the officers of the said house of correction as a direction to them to make the like provision as was usual at Sessions; and, accordingly,

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refreshment was provided for the Chancellor, his assessor *and secretary, the Bar, including the county court Judge concerned in the inquiry and his counsel, and for the magistrates, by one Richard Brown, by direction of the officers of the said house of correction. That the expense of such refreshments, as this deponent is informed, but of which at the time he had no knowledge, was included in the charge of those provided at Sessions; and, at the end of the quarter terminating in November, an order was made out [for 80*l.* 19*s.* 0*d.*] and signed by two visiting justices, to wit John Bairstow and Richard Newsham, in the usual form, and according to the rules." * * *

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The order for 80*l.* 19*s.* was handed to Brown, and by him presented to the Lancaster Banking Company and paid by them, without the personal knowledge or interference of the treasurer. The payment was not charged against the county rate, nor otherwise than in the treasurer's account presented, at the annual Session holden 1st July, 1852, wherein, under the head of "Houses of Correction at Preston and Kirkdale," was the item "Session Expenses, 287*l.* 2*s.* 3*d.*," which included the charge contained in the order of the visiting justices; and the treasurer credited himself with the item as a charge to be paid out of the rate levied upon the five hundreds. Neither the treasurer nor the bankers had any means of knowing how much of the amount mentioned in the order was for expenses connected with the Chancellor's Court or the inquiry. But, when the accounts came to be considered at an adjourned annual Session, held on 9th of September, 1852, a debate took place, and inquiry was made how much of the charge arose from the sitting of the Chancellor at Preston: and, the governor of the prison having stated that 53*l.* 7*s.* 6*d.* was the amount so arising, that sum was disallowed. Up to this time, the treasurer was in utter ignorance of such item having been included in the said order for 80*l.* 19*s.*

Joseph Kay now showed cause :

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The order of 30th June, 1853, cannot be quashed on *certiorari*. In the first place there is no defect on the face of the order, nor on the face of the account to which it refers. The affidavit upon which the *certiorari* was obtained shows, indeed, that the sum of 287*l.* 2*s.* 3*d.*, allowed in the account as "Sessions Expenses," includes the sum of 53*l.* 7*s.* 6*d.*, expended upon refreshments. As a distinct *head of county expenditure, the justices had perhaps no power to allow the last sum: but they had power to review the item of "Sessions

Expenses;" and it is not competent for this Court to investigate the account, and inquire whether, or in what way, the sum of 287*l.* 2*s.* 8*d.* is excessive. The order of the visiting justices is not brought up; and, being an order within stat. 18 Geo. II. c. 18, s. 5. and more than six months having elapsed, it could not be brought up

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(LORD CAMPBELL, Ch. J.: The argument against you is that the two justices had no more power to include the 53*l.* 7*s.* 6*d.* in the Sessions expenses than they had to include the expenses of a ball or a bull-baiting.

CROMPTON, J.: A void order is made by the justices, and acted upon by the treasurer: the objection is to this being allowed in the county accounts: why need the void order be brought up?)

Without that, the Court has no means of seeing any want of jurisdiction on the part of the Sessions. Mr. Saunders, the applicant, is himself one of the body who has consented to the authority of the two justices to investigate the account.

(CROMPTON, J.: That argument, if valid, would apply equally if the original order of allowance had been brought up.)

The original order is not void: it is simply erroneous by reason of excess. In fact it appears from the treasurer's affidavit that, when the bankers paid the 80*l.* 19*s.*, he did not know, and had no means of knowing, that it included a charge for refreshments. * * The several divisions of the county, as appears by the affidavit in answer, have adopted the rules under which these accounts have been investigated: the payment is in effect the act of the Sessions, not of the treasurer. If they had, under these circumstances, no power to reopen the accounts after the payment, all done after the payment is a nullity; and the question must turn on the original order of allowance. That is not before the Court: and, if it were, this Court could not enter into the question how items, good on the face of the accounts, are in fact made up.

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Sir F. Thesiger and Cowling, contra (1):

It seems scarcely disputed that this sum of 53*l.* 7*s.* 6*d.* was

(1) The argument in support of the rule was heard, and the judgments delivered, on 3rd June; the Judges who sat on May 31st were Lord Campbell, Ch. J., Erle and Crompton,

JJ.; on June 3rd Erle and Crompton, JJ. only, Lord Campbell, Ch. J. being on that day in the Court of Criminal Appeal.

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expended on purposes in no way connected with county matters, and ought not be paid out of the public stock of the county: but it is, in substance, contended that, though the payment was unjustifiable, this is not the proper way to remedy the misapplication. No suggestion is made as to what other course is to be pursued; and it appears that the present course is right. By stat. 12 Geo. II. c. 29, s. 6, the treasurer of the county is to pay the money in his hands "as the said justices at their respective General or Quarter Sessions, or the greater part of them then and there assembled, shall by their orders from time to time direct and appoint, for the uses and purposes of the said recited Acts, and for any other uses and purposes to *which the public stock of any county," &c., "is or shall be applicable by law." So that the orders must be made in General or Quarter Sessions, and must be for legal purposes. What is called the order of the two visiting justices was neither one nor the other. It was by two justices, and was for "magistrates' luncheons."

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(ERLE, J.: Do you wish to call in question the legality of allowing out of the county rate such refreshments as are fairly incident to the transaction of county business, or the validity of the system by which in this large county the Sessions delegate to a small number of visiting justices the superintendence of the gaol accounts? Both are so evidently practically beneficial that I should think your clients would not wish to disturb the practice.)

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Certainly not: the expenses of refreshments incident to county business are not objectionable; but they must not be made the means of covering objectionable expenses. * * The treasurer is responsible for the money in his hands; if he pays it for a proper purpose, he is nearly sure that the justices at Sessions will allow his accounts; but he is bound to see at his peril that the purposes are proper. * * *

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ERLE, J.:

The rule must be absolute to quash so much of the orders of Sessions as is complained of.

I will first suppose that a direct application had been made to the Sessions, asking them to order the payment of these expenses, and that the Sessions had made an order on the treasurer to pay them. Now, as I understand *Rex v. Williams* (1), an order to pay money for matters not connected with the county is one which,

(1) 22 R. R. 352 (3 B. & Ald. 215).

when the want of connection is apparent on the face of the order, ought not to be obeyed by the treasurer; and the payment ought not, if made, to be allowed. In the present case it is not argued that these expenses are such as ought to be paid out of the county rate; but reliance is placed on the order of the two visiting justices, which, it is said, was a judicial order, binding on the treasurer, and on the Sessions. It appears that in this county an arrangement has been made, by the Sessions, for regulating the payment of moneys by the treasurer for the service of the gaols; under which the expenses of the gaols are to be, from time to time, certified by two visiting justices, and then to be paid by the treasurer. Now, even if the effect of this arrangement was to give to the two visiting justices all the power to decide on the allowance of expenses, which the Sessions themselves had, and assuming that such a delegation was legal, it is still manifest that the Sessions could not give the visiting justices a greater power than they could have themselves exercised, if they had themselves made an order, as was *supposed by me in the beginning of my judgment. I think, however, that it was not intended to invest the two visiting justices with authority to allow any items. They were deputed, in a manner, to advise the treasurer as to what payments he should make; and in all probability payments which they directed would be sanctioned by the Sessions. But, if they should direct an illegal payment, and that fact is brought to the notice of the Sessions when auditing the accounts, the Sessions are bound, notwithstanding the direction of the visiting justices, to disallow the payment. I have hitherto proceeded on the supposition that the Sessions had allowed this payment. But, in fact, they disallowed it; and the year's account, with this item disallowed, became as it were a record under stat. 15 & 16 Vict. c. 81, s. 50; so that it is difficult to see how any subsequent Sessions could open up what had become *res judicata*. Still more difficult is it, in my mind, to see how that could be done by a Sessions which took upon itself to dispense with that very salutary standing order requiring notice to be given. That, if there were no other objection to this order, would make it at least doubtful whether the order should not be quashed; because the Sessions were not properly constituted to entertain the question.

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CROMPTON, J.:

I agree that the order must be quashed for two reasons.

First: I think that the Sessions, in 1853, had no power to

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interfere with what the former Sessions, in 1852, had done by disallowing (and in this case, as it happens, properly disallowing) a payment. It would be a very dangerous practice if such a thing were suffered. Items which ought to have been borne by *the rate-payers in one year might be thrown on the rate-payers in another. That is a sufficient ground for making this rule absolute. But I should have come to the same conclusion if the first Sessions, when passing the treasurer's accounts, had allowed, instead of disallowing, this item. Passing accounts is a judicial act; those who do so ought to examine, and allow or disallow according to law: and, this being a judicial act, and the *certiorari* not being taken away, we are bound, if it appears that an illegal item has been passed, to grant a *certiorari* and to quash the illegal allowance. It is said that the order of the two visiting justices ought to have been brought up by *certiorari*. I am unable to see any ground for that. The order of the two visiting justices could not take away the discretion of those who are to pass the treasurer's accounts; and the rate-payers therefore were not affected by it. The grievance to the rate-payers was not the making of that order by the visiting justices, but the order of Sessions by which the sum passed into the accounts, and so became one of the items which the county is rated to pay. But, in effect, that which is called an order of the two justices was not an order on the treasurer, but a voucher to him.

I am therefore of opinion that the rule should be absolute; because the Sessions had no power to interfere with the disallowance by the former Sessions, and because that disallowance by the former Sessions was right.

Rule absolute.

REG. v. ABNEY.

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(3 EL. & BL. 779—784; S. C. 2 C. L. R. 1488; 23 L. J. M. C. 154; 18 Jur. 1052.)

Quære, whether, under stats. 58 Geo. III. c. 45, 59 Geo. III. c. 134, a rate can be laid for the purpose of providing additional burying ground?

If it can, still a single rate, laid for purposes authorized by these Acts, and also for purposes for which a church rate can be laid only at common law, is bad.

Therefore, where a rate was laid, with the formalities requisite for a rate under the statutes, "for and towards providing necessary additional burial ground" for a parish, "and for and towards spouting" a chapel, and the magistrates refused to issue a distress warrant for non-payment, this Court refused to order the magistrates to issue the warrant.

C. G. MEREWETHER, in Easter Term, 1853, obtained a rule calling on William Wootton Abney and the Reverend John Manuel

Echalaz, two justices of Leicestershire, and on William Stinson, to show cause why the said two justices should not issue a warrant for distress and sale of the goods and chattels of the said W. Stinson to levy the sum of 14s. 9½d., assessed upon him by a church-rate granted for the parish of Whitwick in the said county, on 17th December last, and the sum of 10s. for costs, adjudged by an order of the said two justices, made 12th March last, to be paid by the said W. Stinson to William Bonnett as one of the churchwardens of the said parish.

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The rule having come on for argument, it was ordered, by consent, that the rule should be enlarged, and that, in the meantime, a special case should be stated for the opinion of this Court, as to the validity of the rate, upon objections taken before the said justices: the churchwardens of the said parish, and the said William Stinson, to be the parties to the case.

The case was, in substance, as follows.

Upon 17th December, 1852, a vestry meeting for the parish of Whitwick was held in the accustomed place, in pursuance of the following notice.

“This is to give notice: that a vestry meeting of the ratepayers of the three townships of the parish of Whitwick will be held at the Infant School Room on *Friday the 17th day of December instant, at 2 o'clock in the afternoon, to determine the best mode of providing additional burial ground for the said parish, and to make a church-rate for that purpose; and also for the draining of Saint George's Chapel Yard, and for spouting Saint George's Chapel, Whitwick. December 11th, 1852.

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“Signed, WILLIAM BONNETT, Churchwarden.
FRANCIS MEREWETHER, Vicar.”

The above notice was published, as directed by the Act, upon the door of the parish church, but was so for one Sunday only.

At this meeting, a rate was granted by a majority of the rated inhabitants present.

The rate so made was laid as follows. “We, the churchwardens and other parishioners of the parish of Whitwick, in the county of Leicester, whose names are hereafter subscribed, in pursuance of a resolution passed at the vestry meeting duly holden the 17th day of December, 1852, for granting a rate of 4½d. in the pound for and towards providing necessary additional burial ground for the said parish, and for and towards the draining of Saint George's Chapel

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Yard, and for and towards spouting Saint George's Chapel in the said parish, rate and tax all and every the inhabitants and parishioners, and other ratepayers of the parish aforesaid, hereunder mentioned, to the said rate in the sums hereafter mentioned. Signed" by one churchwarden, the vicar (who was chairman), a curate, two overseers, and another.

The rate was duly allowed, and was, during the month of February, demanded of William Stinson; and, in consequence of his refusal, a summons was applied for and obtained, which came on for hearing before two justices at Ashby-de-la-Zouch, March 12th, 1853.

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Stinson, with his attorney, attended.

The magistrates decided against Stinson, and ordered him to pay the rate. They, however, declined to issue a distress warrant: and the above rule was therefore obtained in this Court; when the Court ordered this case to be stated, to try the validity of the rate.

The two Church Building Acts referred to are 58 Geo. III. c. 45, ss. 59, 60, 59 Geo. III. c. 134, s. 24.

The question for the opinion of the Court is, Whether the rate is good as against the objections stated above (1). If the Court shall be of opinion in the affirmative, then it is agreed that the rule shall be made absolute, the rate paid, and all proceedings stayed. But, if the Court shall be of opinion in the negative, then it is agreed that the rule shall be discharged.

C. G. Merewether, in support of the application:

Three objections are made to the rate: first, that, under stats. 58 Geo. III. c. 45, 59 Geo. III. c. 134, there is no power to lay a rate for the purpose of enlarging the burial ground; secondly, that, if there be such power, notice should have been given on two Sundays. Thirdly, that a rate for such purpose, if authorized by statute, cannot be joined with a church-rate. (The Court having pronounced no opinion on the first (2) and second (3) objections, the argument as to them is omitted.) As to the third objection, if the vestry have power to lay a rate for each purpose, why should they not lay it for the two jointly? Sect. 25 of stat. 59 Geo. III. c. 134, under which, if at all, the rate for enlarging *the burial ground is to be levied,

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(1) The case contained no statement of objections except as in the text.

(2) As to this, reference was made to stat. 58 Geo. III. c. 45, ss. 59, 60,

61, and stat. 59 Geo. III. c. 134, ss. 24, 25.

(3) Reference was made to stat. 59 Geo. III. c. 134, s. 25.

enacts that "every such rate shall be made, raised, levied, collected, received and accounted for in like manner, and with all such powers, authorities, provisoes and regulations, and under and subject to such penalties and forfeitures, as are in law applicable to the making, raising, levying and collecting any church-rate in any parish."

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Bovill, contra :

(The argument as to the first and second objection is omitted.)

Reg. v. Byrom (1) is a decisive authority in favour of the third objection.

(LORD CAMPBELL, Ch. J. : The objection, which there appeared on the face of the rate, was not like this.)

C. G. Merewether, in reply :

If there be any deficiency, for the supply of which a rate may be made, that authorizes a general rate.

(CROMPTON, J. : The determination, as to different items, might be different ; and the preliminary steps vary, in time and other particulars.)

Here nothing appears which is the subject of a common law church-rate except the spouting Saint George's Chapel.

(LORD CAMPBELL, Ch. J. : That item may be larger or smaller : but it cannot be supplied from the same fund as the providing of an additional burial ground.)

The whole is the subject of church-rate.

LORD CAMPBELL, Ch. J. :

I should be sorry to decide this case on the first objection. At present, indeed, I see no sufficient authority for laying a rate for the purpose of enlarging the burial ground : but it is not impossible that some authority might be found in one of the two Acts. But, as to the third objection, I have no *doubt. The rate for the purpose of spouting the chapel is a church-rate, authorized by common law. But the common law gives no power to rate for the purpose

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of enlarging the burial ground. It is very proper that there should, in a Christian country, be some power of providing additional means of sepulture as population increases: but for that a statute is requisite. Now here the statutes prescribe peculiar modes of making the rates which they authorize; there are regulations as to dissents, consents, and so on, of which none apply to the common law church-rates. It cannot therefore be lawful to lay on one rate for both purposes: and, this rate being thus bad, we cannot call on the magistrates to enforce it.

ERLE, J.:

For the purpose of the third objection, it is to be assumed that the statutes give power to lay a rate for the purpose of providing additional burying ground. But then this is a rate which has incidents different to those of a common law church-rate: and, that being so, the two must not be blended. Whether the words "enlarging or otherwise extending the accommodation in the then existing churches or chapels" (1) comprehend the making additions to the burial ground is a matter well worth further inquiry. I find that 2 stat. 35 Edw. I. recites that "a church-yard that is dedicated is the soil of a church."

CROMPTON, J.:

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I do not see how there can be one good rate for common law purposes and also for those of the Acts: the machinery is altogether different; a rate for one would become valid long before a rate for *the other. I do not see how the parishioners can give their assents or dissents under the common process for laying a church-rate.

(No fourth Judge was present.)

Rule discharged.

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May 31.
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REG. v. DERBYSHIRE, &c. RAILWAY.

(3 EL. & BL. 784—792; S. C. 23 L. J. Q. B. 333; 18 Jur. 1054.)

Under sect. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), a party who has recovered judgment against a Company is not precluded from issuing execution against the shareholders who have not paid up for their shares, though lands of the Company have been

(1) Stat. 58 Geo. III. c. 45, s. 59. See also stat. 59 Geo. III. c. 134, s. 25.

delivered on *legit*, if the proceeds of the lands be insufficient to satisfy the debt (1).

Therefore, in such a case, a *mandamus* issued commanding the Company to give the creditor inspection of the register of shareholders (2).

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a.
DERBYSHIRE,
& G. RAILWAY.

MANDAMUS to the Derbyshire, Staffordshire and Worcestershire Junction Railway Company. The writ recited that, by the Derbyshire, Staffordshire and Worcestershire Junction Railway Act, 1847 (3), the Company were incorporated by the name before mentioned, and were authorized to construct the railway and works therein mentioned: and, by the said Act, it was, amongst other things, enacted, that the Companies Clauses Consolidation Act, 1845, and certain other Acts of Parliament should be incorporated with, and form part of, the first mentioned Act. That, in pursuance of the powers given by the first mentioned Act, and the said Acts incorporated therewith, the Company had taken divers proceedings in and towards the execution of the objects and purposes in the said Acts mentioned, *and had raised divers sums of money by calls on the several persons being shareholders in the Company, and had kept, and had now, in their custody, possession or control, a book called the Register of Shareholders, containing the names of the several corporations and the names and addresses of the several persons entitled to shares in the said Company, and the amounts of the subscriptions paid upon such shares, and certain other particulars required to be entered therein by the Companies Clauses Consolidation Act, 1845. That the Company, since the period of their incorporation, had incurred divers debts to divers persons, and, in particular, a certain debt to one John Addison, for (to wit) 1,572*l.*; for which debt an action was heretofore, to wit on 18th December, 1852, brought by J. Addison against the Company in the Court of Exchequer; and in which action, afterwards, to wit on 22nd June last, judgment was recovered and signed by J. Addison against the Company for the said sum of 1,572*l.* That a large &c., to wit, 800*l.*, was now due and payable under the said judgment: and J. Addison was and is entitled to levy the same by execution under the said judgment. That J. Addison had endeavoured to levy the said sum of 800*l.* against the property

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(1) See R. S. C., Order XLII., r. 23 (d).

(2) See R. S. C., Order XLII., r. 32.

(3) Stat. 10 & 11 Vict. c. cx., local and personal, public: "To authorize the construction of a railway from Cannock in the county of Stafford

to Uttoxeter in the same county, to join the North Staffordshire Railway Potteries line, by a Company to be called the Derbyshire, Staffordshire and Worcestershire Junction Railway Company" (*sic*).

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and effects of the Company, and, for that purpose, had issued certain writs of execution out of the Court of Exchequer, to wit a writ of *fiery facias*, and also a certain writ of *elegit*, against the Company, and had endeavoured to levy the last mentioned sum on the said respective writs, but had wholly failed therein; and there hath not been, and cannot be, found sufficient property and effects of the Company whereon to levy such execution; and the said 800*l.* still remains wholly unpaid and unsatisfied. That J. *Addison, not being able to levy any such execution against the property and effects of the Company, had been and was desirous of issuing execution against the shareholders of the Company, to the extent of their shares respectively in the capital of the Company not paid up, and of obtaining an order of the Court of Exchequer for that purpose, pursuant to the provisions of the said last mentioned statute in that behalf. That J. Addison, for the purpose of obtaining such order and issuing such execution as last aforesaid, had been and was desirous of inspecting the said Register of Shareholders in the Company, for the purpose of ascertaining the names of such shareholders, and the amount of capital remaining to be paid upon their respective shares. That the Company had been duly required, by and on behalf of J. Addison, to produce the Register to him, in order that he might inspect the same for the purpose aforesaid; but the Company had neglected and refused, and did still neglect and refuse, to produce the same to him. The writ then commanded the Company to produce to J. Addison the Register, and allow him to inspect the same for the purpose &c.; or to show cause &c.

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Return. "We, the Derbyshire, Staffordshire, and Worcestershire Junction Railway, do most humbly certify" &c., "that, by the first statute within mentioned, we were and now are incorporated by the name of the Derbyshire, Staffordshire and Worcestershire Junction Railway (1), and not by the name of the Derbyshire, Staffordshire and Worcestershire Junction Railway Company, or any other name whatsoever than the said name of the Derbyshire, Staffordshire and Worcestershire *Junction Railway. And we, the Derbyshire, Staffordshire and Worcestershire Junction Railway, do further most humbly certify and return" that the writ of *elegit* mentioned was a writ of *elegit* issued by J. Addison upon the judgment recovered by him as mentioned, and was directed to the Sheriff of Staffordshire: and that, under and

by virtue of the said writ, the sheriff, before the issuing of the within writ, to wit on 7th January, 1854, duly and according to law caused to be delivered to J. Addison, at a reasonable price and extent in that behalf, divers, to wit five, closes, pieces or parcels of land situate and being in the parish of Cannock in the said county, and of and in which defendants were seized in their demesne as of fee at the time of entering up the said judgment, to hold to him and his assigns according to the form of the statute in such case made and provided, until the sum of money and interest in the writ of *elegit* mentioned should be thereof levied, as by the last mentioned writ the sheriff was commanded. And that the sheriff, before the issuing of the within writ, to wit on the day and year last aforesaid, duly returned the writ of *elegit*; as by the said last mentioned writ &c. will more fully and at large appear. "That the said execution, so levied as aforesaid, has not been in any way reversed, annulled or vacated, but still remains in full force and virtue: and that J. Addison has not been evicted from the said closes, pieces or parcels of land so delivered to him as aforesaid: and therefore we humbly submit to our sovereign lady the Queen that, for the causes aforesaid, we ought not to be required to produce to the said J. Addison the said Register of Shareholders, and allow him to inspect the same, as by the within writ we are commanded."

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&C. RAILWAY.

Plea, by J. Addison: That the several closes and pieces or parcels of land in the return mentioned, and therein alleged to have been caused to be delivered to J. Addison, by the Sheriff of Staffordshire, were, at the time of the alleged delivery to the said J. Addison, found by the sheriff to be, and in fact were, of the yearly value of 10s. in the whole, and no more, as by the return of the sheriff to the writ of *elegit* will more fully appear. That the yearly interest alone upon the said judgment debt of J. Addison, and which the sheriff was commanded to levy by the said writ of *elegit*, was of far greater amount than the entire yearly value of the said closes and pieces or parcels of land. That, by reason of such insufficiency of value of the said closes and pieces and parcels of land, it became and was impossible for him to levy his said execution, and obtain satisfaction of the said sum of money and interest in the writ of *elegit* mentioned from and out of the lands of the Company. And J. Addison, in consequence thereof, did not enter into or take the actual possession of the said closes and pieces or parcels of land, or any of them, or any part thereof; nor did he bring any action of

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REG. ejectment for the recovery of the actual possession thereof, or of
 DERBYSHIRE, any part thereof: but he hath wholly declined and refused so to do.
 &C. RAILWAY. Verification.

Demurrer. Joinder.

Hugh Hill, for the defendants:

The misnomer makes the writ bad: *Rex v. The Mayor, &c. of Rippon* (1).

(*G. Hayes*, for the Crown, prayed that the writ might be amended, by the omission of the word "Company.")

[789] The Court ordered the amendment to be made.)

The other question arises under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). [He then cited sect. 36, and proceeded:] The condition precedent to the inspection is therefore that execution shall have been issued against the effects of the Company, and the impossibility of finding "sufficient whereon to levy such execution." But here an *elegit* has issued; and the land has been delivered to the creditor: and, after *elegit*, the plaintiff is considered in law to be fully satisfied by the proceeds of the land. * *

[790] In order to apply sect. 36, it must be shown what sum is owing: but that cannot be done where lands have been delivered on *elegit*, because they may be held till the whole debt is received. If a *fi. fa.* had been levied, and the sheriff had returned that he had taken goods which remained in his hands for want of buyers, it could not be said that execution had not been levied. Under stat. 7 Geo. IV. c. 46, s. 13, the question is whether a party applying for *scire facias* against shareholders has done all in his power to obtain satisfaction, but ineffectually: *Harvey v. Scott* (2), *Field v. Mackenzie* (3), *Dodgson v. Scott* (4). An *elegit* would not be necessary to show this
 [*791] where the lands were worthless: *and a similar reasoning would apply here: so that the creditor has himself only to blame for the difficulty in which he is placed. No stress can be fairly laid on the words "such execution," in sect. 36 of the Companies Clauses Consolidation Act, 1845.

G. Hayes, contra:

The *elegit* issued in consequence of a doubt which has been

(1) 2 Salk. 433.

(2) 11 Q. B. 92.

(3) 72 R. R. 702 (4 C. B. 705).

(4) 76 R. R. 657 (2 Ex. 457).

suggested, in the Court of Exchequer (1), whether a creditor of a Company could be entitled to the benefit of sect. 36, before taking out *elegit* against any land which the Company might have. Here the debt will clearly not be satisfied, either principal or interest, from the lands.

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(ERLE, J. : We can hardly decide this question upon the ground of what may seem reasonable or not. Suppose 10,000*l.* is owing from a man, and he is taken under a *ca. sa.* ; that satisfies all in law.)

The question under sect. 36 is, Whether there can “be found sufficient whereon to levy such execution.” The remedy is entirely under the statute: of course, without the statute, the *elegit* would preclude any other execution.

(CROMPTON, J. : Even according to *Mr. Hill's* argument, the statutable remedy is not entirely gone. The judgment still stands ; and an *elegit* might therefore go against fresh lands.)

(*G. Hayes* was then stopped by the Court.)

LORD CAMPBELL, Ch. J. :

I am of opinion that the prosecutor is entitled to the remedy which he seeks. There are two conditions to be fulfilled before a creditor proceeds against the individual shareholders: first, that “any execution” shall have issued against the property *of the Company; secondly, that “there cannot be found sufficient whereon to levy such execution.” Now, the *elegit* having issued, can there be found sufficient whereon to levy? The proceeds of the *elegit* clearly are not sufficient. Both conditions, therefore, are fulfilled; and the prosecutor is entitled under the express words of the statute.

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ERLE, J. :

I also am of opinion that we ought to give judgment for the prosecutor. That clearly furthers the intention of the statute, which is, that the attempt should first be made to obtain satisfaction from the property of the Company, and, that failing, satisfaction should be had from such shareholders as have not paid up for their shares. There is therefore to be a thorough examination whether the Company has any funds to satisfy the judgment; and that has been done here. I am glad that no technical objection

(1) The reference is probably to *and Worcestershire Junction Railway Rastrick v. Derbyshire, Staffordshire, Company*, 96 R. R. 627 (9 Ex. 149).

REG. intervenes to prevent us from giving effect to the intention of the
 * DERBYSHIRE, Legislature. Another *elegit* might issue; the prosecutor is there-
 & C. RAILWAY. fore a "person entitled to any such execution."

CROMPTON, J.:

I think we ought to import no technicalities into the operation of the statute. The provision is new. The creditor is first to see what he can get from the Company; if he cannot get enough to satisfy his debt, a fresh remedy is given; but it is not a fresh execution. I see no reason for applying the old technical rules to such a case.

(No fourth Judge was present.)

Judgment for the Crown.

1854.
 May 31.

CHURCHWARDENS OF ST. ANNE v. LINNEAN SOCIETY (1).

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(3 El. & Bl. 793—807; S. C. 23 L. J. M. C. 148; 18 Jur. 859; S. C. nom. *R. v. Linnean Society*, 2 W. R. 516; 2 C. L. Rep. 761; 23 L. T. O. S. 186.)

The Linnean Society of London was incorporated by Royal charter for the cultivation of the science of natural history in all its branches, and more especially of the natural history of Great Britain and Ireland.

It was supported by admission fees and contributions of its own fellows, who entered into an engagement to make the payments, and were liable to ejection for non-payment. The fellows were entitled to receive copies of the published Transactions.

Held, that the Society was exempt from rate, in respect of premises occupied for its business, under the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1, as being instituted for purposes of science exclusively, and supported by annual voluntary contributions; CROMPTON, J. hesitating as to the question whether the payments were voluntary.

The Society let off some rooms of the house in which it transacted its business to B., the occupier of the adjacent house, granting him also free use of the hall and staircase and passages of its house: Held, that this did not make the Society rateable for the rooms which it occupied for the purposes of the institution.

The librarian and porter, whose attendance in the house was necessary for the purposes of the institution, occupied rooms in the part of the house retained by the Society, and, in consideration thereof, received less salary: Held, that the Society was occupier of these rooms, for the purposes of the institution, and that no rate could be laid in respect of such rooms.

ON 24th March, 1853, a rate for the relief of the poor was made and allowed by a magistrate acting for the liberty of Westminster

(1) Cited, *In re New University Club* 63 L. T. 36; *Art Union v. Savoy Overseers* [1894] 2 Q. B. 609, 63 L. J. M. C. 253, 71 L. T. 40; *Savoy Overseers v. Art Union* [1896] A. C. 296, 65 L. J. M. C. 161, 74 L. T. 497.
 (1887) 18 Q. B. D. 720, 730, 56 L. J. Q. B. 462, 56 L. T. 909; *Inland Revenue Commissioners v. Forrest* (1890) 15 App. Cas. 334, 339, 60 L. J. Q. B. 281,

for the above parish, in which the Linnean Society was assessed for the house No. 32, Soho Square, as below.

CHURCH-
WARDENS OF
ST. ANNE
v.
LINNEAN
SOCIETY.

Name of Occupier.	Description of Property rated.	Name or situation of Property.	Rateable value.
Linnean Society. Robert Brown.	House. House.	32, Soho Square. 17, Dean Street.	£124. 60.

The Linnean Society having objected to this rate, a case was submitted to this Court, under stat. 12 & 13 Vict. c. 45, s. 11, which in substance, was as follows.

The Society claims exemption from rate, on the ground that it comes within stat. 6 & 7 Vict. c. 36.

The Society was incorporated by a Royal charter, dated 26th March, 1802, for the purposes therein mentioned, and has been conducted in conformity with the provisions of that charter unless the facts stated in this case are inconsistent with such purposes.

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A printed copy of this charter, together with all its bye-laws, accompanied the case, and was to be taken as part of it.

The charter recited that several of the King's subjects "are desirous of forming a society for the cultivation of the science of natural history in all its branches, and more especially of the natural history of Great Britain and Ireland, and, having subscribed considerable sums of money for that purpose, have humbly besought us to grant unto them, and such other persons as shall be approved and elected, as hereinafter is mentioned, our Royal charter of incorporation for the purposes aforesaid." The charter then incorporated certain persons (named) by the name of the Linnean Society of London, with an indefinite number of fellows (the first fellows were named), with a council of fifteen of the fellows, and with officers designated in the charter. Power for appointing fresh officers and electing and removing fellows and members were given: "and that the council hereby appointed, and the council of the said Society for the time being, or any five or more of them, all the members thereof having been first duly summoned to attend the meetings thereof, shall and may have power, according to the best of their judgment and discretion, to make and establish such bye-laws as they shall deem useful and necessary for the regulation of the said Society, and of the estate, goods, and business *thereof; and for fixing and determining the times and places of meeting of the said Society, and also the times,

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place, and manner of electing, appointing, and removing all fellows, honorary members, foreign members, and associates, of the said Society, and all such subordinate officers, attendants, and servants, as shall be deemed necessary or useful for the said Society; and also for filling up, from time to time, any vacancies which may happen by death, removal or otherwise, in any of the offices or appointments constituted or established for the execution of the business and concerns of the said Society; and for regulating and ascertaining the qualifications of persons to become fellows, honorary members, foreign members, and associates, of the said Society respectively, and also the sum and sums of money to be paid by them respectively, whether upon admission or otherwise, towards carrying on the purposes of the said Society; and such bye-laws, from time to time, to vary, alter, or revoke, and make such new and other bye-laws as they shall think most useful and expedient, so that the same be not repugnant to these presents, or to the laws of this our realm." Regulations were added as to the mode of making, altering and repealing bye-laws.

The parts of the bye-laws material to the argument and judgment, and not mentioned in the body of the case, were the following.

Chapter I.

"Section I. Every fellow who intends to propose any person to be a fellow of the Society, shall, before such person be proposed, make known to him the nature of the obligation into which he is to enter, in the event of his being elected; and also the sum which is to be paid for admission money, the rate of annual payments, *and the sum to be paid in lieu of annual payments, for the use of the Society."

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"VII. No person elected shall be admitted a fellow of the Society, until he shall have paid his admission fee, and signed the usual obligation for the payment of yearly contributions, or paid the sum appointed in lieu of such contributions."

"X. No person shall be deemed an actual fellow of the Society, nor shall the name of any person be printed in the annual list of the fellows of the Society, until such person shall have paid his admission fee, and signed the usual obligation for the payment of annual contributions, or paid the sum appointed in lieu of such contributions; and no such person shall have liberty to vote at any election or meeting of the Society, before he shall have been admitted as directed in the preceding section."

Chapter II.

"Sect. I. All fellows elected on or before the twenty-fourth day of May, 1802, who have already paid their admission fees, but have not paid the sum of ten guineas at one payment, in lieu of all annual contributions, shall pay to the use of the Society the annual sum of one guinea; the first payment to become due on the twenty-fourth day of May, 1803. Provided, however, that every such fellow may, at any time, compound for all future annual payments by paying the said sum of ten guineas, including the annual guinea which may be due at the time such composition shall be paid."

Sects. II., III., IV., V., make provisions for the payments of admission fees, annual contributions, or compositions, in the cases of fellows elected at times later than 24th May, 1802. * * *

"VII. If any fellow paying yearly contributions should fail to bring, or send in the same to the treasurer, within twelve months after each anniversary meeting, unless the said payment be remitted in whole or in part by special order of the council, his obligation shall be put in suit for the recovery thereof, and he shall be liable to ejection from the Society; upon which the council shall proceed as they may see cause."

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Chapter VI.

"Section II. No fellow shall be understood to have withdrawn himself from the Society, until he shall have signified such his intention by letter, under his hand, addressed to the president; and if such letter be not left at the apartments of the Society, between the twenty-fourth day of May in any year and the first day of February next following, the contribution of such fellow shall be understood to be continued for the whole of the year in which he shall have so withdrawn himself."

Chapter XV.

"Sect. I. The Transactions of the Society shall be printed at such times, and in such manner, as the council for the time being shall direct, at the sole charge, and for the sole use and benefit of the Society."

"II. Every fellow, whose payments to the Society shall have been paid up to the time of publication of *each volume of the Society's Transactions, shall be entitled to one copy of such volume; but no fellow who shall not have paid the sum appointed in lieu of all annual payments, or paid at least one yearly contribution at the time of publication, shall be considered as entitled thereto."

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The Society was duly certified, by the barrister authorized for that purpose, to be entitled to the benefit of the statute. The bye-laws of the Society provide that it shall not make any dividend, gift, division or bonus in money unto or between any of its members, and have also been duly certified.

The officers of the Society are a president, a treasurer, a secretary a clerk, librarian and housekeeper, and a porter.

The business of the Society is managed by the president and such fellows as are members of the council in the manner prescribed in Chapter XIV. of the bye-laws: and meetings are held periodically, at which papers regarding natural history are read and discussed; and such of them as it is the sense of a standing committee of the Society should be published (bye-law Chap. XIV.), are printed in their Transactions.

Between 300 and 400 copies of the Transactions are circulated amongst the fellows. Others are sold to the public. And about 50 other copies are gratuitously distributed amongst other institutions both at home and abroad. The printing, publication and sale of these Transactions do not defray their own expenses; and the only object of the Society, in so selling, is to reduce the expenses incurred by them in such printing, publication and sale.

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Some of the fellows pay annual contributions. Others pay the sum appointed in lieu of annual contributions. The Society is partly supported by these several contributions. No contribution or payment of any kind is made by honorary members, foreign members or associates.

The fellows are entitled to have gratis a copy of all those Transactions which are published subsequently to their having paid the first annual subscription, or the sum in lieu of all annual contributions. The Transactions are published by Longman & Co., booksellers, who sell them to the public by commission, at a fixed price, making to the purchaser, if he be a bookseller, the usual allowance of 25 per cent. Other copies of these publications are kept at the Society's house for sale, where they may be purchased by the public on the same terms as if bought at Longman & Co.'s. But all those fellows who may wish to have those volumes which may have been published before they became subscribers are allowed the booksellers' privilege of purchasing them at a reduction of 25 per cent. The only object in making an allowance to fellows on the purchase of volumes or parts of the Transactions is to enable

them to purchase at a reduced price those volumes or parts which were published before their admission as fellows.

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The clerk, librarian and housekeeper of the Society occupies, as his dwelling, two rooms within the house, No. 32, Soho Square, and wholly lives there. The library, museum and other matters of the Society under the care of this officer are very valuable. The porter of the Society also dwells in the house No. 32. And it is admitted by the parish officers that it is convenient *and reasonably necessary that the porter should so dwell there. The clerk, librarian and housekeeper, and the porter, respectively, receive salary or wages for their services, and pay no rent for the use of the rooms in which they dwell, the value of the permissive use of such rooms being however taken into account in fixing the amount of salary. The remainder of the apartments is entirely appropriated to a museum, library and other rooms suitable to and necessary for the purposes of the Society: and no part of them is unoccupied.

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The premises included in the rate were originally one house only, and formed the town mansion of the late Sir Joseph Banks, and were rated as one tenement (viz. as No. 32, Soho Square), in one sum of 184*l.* per annum. Sir Joseph's principal apartments were in the part fronting Soho Square; but the whole of that part of the house which was in Dean Street was also occupied by him; part of it consisting of his library, and the rest of it of apartments appropriated for the use of different portions of his family. Sir Joseph Banks, by his will, left the residue of a term which he had in this property to Mr. Robert Brown. Soon after his death, Mr. Brown underlet to the Linnean Society, not the whole house, but a certain portion of it fronting Soho Square, and reserved to himself the remainder, which he occupied. In 1851, Mr. Brown's lease expired. And, at the latter end of that year, the Society took from the freeholder a lease, for twenty-one years, from Michaelmas, 1851, of the whole property included in the respective assessments on the Society and Mr. Brown, and which had been previously held by Mr. Brown; and on 6th May, 1851, by lease (which formed part of the case), underlet to Mr. Brown, for twenty-one years, wanting two days, *from Michaelmas, 1851, the same premises which he had reserved to himself when he underlet to the Society; that is to say:

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Firstly: "All that messuage or tenement, dwelling-house and private museum, outbuildings, part of yard, area, stairs to basement, inclosed passage, and other the premises coloured" &c. in the plan in the margin, "which said premises are on the east side

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of Dean Street in the parish of St. Anne, Soho, in the county of Middlesex, numbered 17 in the same street, and are situate at the rear of a certain messuage or dwelling-house hereinafter mentioned, situate and being at the south west angle of Soho Square, in the said parish of Saint Anne, Soho, and at No. 32 in the same Square." And, secondly: "All such rooms and accommodations in the said messuage, No. 32 in Soho Square, as are hereinafter mentioned; that is to say, two rooms on the ground floor, marked " &c. on the plan; "one room on the second floor, on part of the same site, called the northern back room, the windows of which face to the west; two small back rooms (on the attic floor over the great room), the windows of which face to the west; together with the use, in common with the said Linnean Society, their successors and assigns, of the hall, staircase and passages forming part of the said dwelling-house No. 32, leading to the said rooms and premises demised, for the purpose of passing and repassing at all times to and from the same."

The premises No. 17, Dean Street, firstly above demised, are wholly, and are alone, included in the assessment on Mr. Brown above set forth.

[*802] Under such underlease, Mr. Brown has ever since *occupied and enjoyed the premises and rights so demised and granted to him.

If the Court shall be of opinion that the Society are not exempted from the rate, the rating of 124*l.* is to stand as confirmed against them. If the Court shall be of opinion that such exemption exists as to all the property except the rooms used as residences by the clerk and by the porter as aforesaid, then the rate on the Society to be reduced to the sum of 24*l.* rateable value in respect of such rooms only. But, if the Court shall be of opinion that there is a complete exemption from liability to poor rate in respect of all such premises, then the rate is to be amended by striking out the sum of 124*l.* inserted as rateable value in the said assessment on the Linnean Society: the parties agreeing that a judgment, in conformity with the decision of this Court, and for such costs as this Court shall adjudge, may be entered on motion by either party at the General Quarter Sessions of the peace for Middlesex.

Pashley, for the respondents:

It must be admitted that this Society is instituted for purposes of science exclusively, and, so far, is within the exception given by

stat. 6 & 7 Vict. c. 36, s. 1. But a question arises, whether it is "supported wholly or in part by annual voluntary contributions," which, by the same section, is also necessary to the exemption. It appears that either annual contributions are paid, or a sum in lieu thereof, under Ch. II. of the bye-laws. There is nothing else in the nature of contribution; and this is not voluntary; for, if any fellow refused to pay, he would of course be ejected, under Ch. II. s. 7.

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(LORD CAMPBELL, Ch. J. : No *one is compelled to continue a fellow. Suppose a party gave a bond, conditioned for the payment, would the payment be the less voluntary? If the undertaking to contribute be voluntary at the outset, does it become compulsory afterwards?)

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In *Russell Institution v. Vestry of St. Giles* (1) this Court, in a case not materially differing from the present as to this point, doubted whether the contributions could be called voluntary. By the bye-laws, Ch. VI. s. 2, the contributions are required for the whole year in the course of which a fellow withdraws himself, unless he have given notice in the manner and during the time there specified. The payment of rent by a tenant from year to year is not voluntary, though, by taking proper steps, he can put an end at once to the tenancy and liability.

(CROMPTON, J. : Payment of rent is not contribution in any sense of the word.

ERLE, J. : Suppose a man directs by will that his executor shall pay 100*l*.)

That is voluntary on the part of the testator, but not on the part of the executor. The next question is, Whether the underlease of a part of the premises to Brown does not put an end to the exemption. As to the part let, the exemption seems not to be insisted on.

(*Cowling, contra*, admitted that there must be a rate in respect of so much.)

The question still is, whether this does not destroy the exemption as to the whole. The premises must be occupied solely for the scientific purpose; it is not enough that the rent be applied to the

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purpose. * * Lastly, the occupation by the librarian and porter cannot be considered as an occupation for the scientific purposes of the Society: they hold, partly, in lieu of salary; and the case falls within the principle of *Gambier v. Overseers of Lydford* (1), which agrees with *Reg. v. Temple* (2).

Cowling, contra, was not called on.

LORD CAMPBELL, Ch. J.:

I think the appellants are entitled to the exemption from rate. It is conceded that the Society is instituted exclusively for scientific purposes: that fulfils one condition of stat. 6 & 7 Vict. c. 36, s. 1: the case is very different from that of a musical club or a subscription instituted for the purpose of enabling the subscribers to read newspapers, or amuse themselves in any other way. Here the exclusive object is science. Then, is the Society maintained partly by voluntary contributions? I am clearly of opinion that it is. For, though the fellows are under an obligation to pay while they continue fellows, the payment is still voluntary, seeing that the obligation was incurred by a voluntary engagement, from which the fellows are at liberty to withdraw; though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary. The case in no way resembles that of *The Russell Institution* (3), where newspapers *were supplied, and accommodations given to the subscribers, preventing the payments from being mere voluntary contributions for the promotion of science. It is true that here copies of the Proceedings are furnished to each member: but that is done only to forward the scientific object by communicating information to the members. Then, as to the underletting. If the Society made any use of the premises which was not connected with the scientific purpose, they would be properly considered as not occupying exclusively for that purpose. But the underletting is of a distinct part to a person who occupies for his own purposes, and is rateable in respect of such part. The Society are not occupiers of that part, and cannot be rated in respect of it. They cannot lose their indemnity because there are rooms in the house which they do not want, and which they therefore let off. Then, as to the occupation by the porter. I assume

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(1) *Ante*, p. 518.

(2) 95 R. R. 484 (2 EL. & BL. 160).

(3) *Russell Institution v. Vestry of St. Giles*, *ante*, p. 565.

that this is subsidiary and necessary to the purposes of the Society: if so, it is an occupation by the Society through their porter and for their own purposes; and this does not destroy the exemption.

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ERLE, J.:

I also am of opinion that this rate must be amended. The Society clearly is one which, according to the Act, fulfils the condition of being instituted for purposes of science exclusively, and supported in part by voluntary contributions, unless the special grounds of objection can be made good. It is suggested that the payments are not voluntary, because every fellow becomes liable to the payment. But this subscription is in the nature of a gift for the purpose of science, nothing being received back for the personal profit of the party paying: and it is voluntary, inasmuch as a party by withdrawing his name will cease to pay. It is quite immaterial, in this question, whether a party can simply cease to pay, or must withdraw his name before doing so. As to the under-letting, the matter is one of fact: the case is like that of two contiguous houses. Some rooms in the Society's house are in fact not wanted; and these are let to the occupier of the contiguous house, an arrangement often made in contiguous houses. The premises let are to be taken as part of Brown's house. The third question is as to the residence of the librarian and porter. The liberty of occupying for the purposes of science, free from rate, clearly could not exist unless some one was in attendance on the premises: so that the question is whether the occupation of the person is in fact subsidiary; and the statement of the case shows that it is so.

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CROMPTON, J.:

During the argument, I was not without doubt whether the Society was supported in part by voluntary contributions; whether the statute is satisfied by the contributions being voluntary at the time when the contributor first undertakes to pay, or whether every payment must be voluntary. I do not wish to put a narrow construction on the statute; but I do not see my way very clearly to the conclusion which the rest of the Court draw. As to the letting off a portion of the house, *Reg. v. Overseers of Manchester* (1) shows that the part occupied by the Society may be exempt from rate, though a part is let off. I see no distinction between taking a house and letting off a room, and taking a room.

(1) 83 R. R. 529 (16 Q. B. 449).

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The occupation by the librarian and *porter is clearly an occupation by the Society for the purposes of the institution.

(No fourth Judge was present.)

Judgment for appellants (without costs).

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(3 EL. & BL. 807—823; S. C. 23 L. J. M. C. 139; S. C. nom. *R. v. Zoological Society*, 18 Jur. 786; 2 W. R. 491; 2 C. L. Rep. 767; 23 L. T. O. S. 171.)

The Zoological Society was incorporated by charter “for the advancement of Zoology and Animal Physiology, and the introduction of new and curious subjects of the animal kingdom.” It occupied land on which were buildings appropriated as receptacles for housing animals and birds, and as a museum for stuffed specimens. Three acres, not so appropriated, were cultivated as a flower garden. Refreshment rooms on the premises were occupied for the purpose of supplying refreshment to visitors, by M., who paid to the Society a rent for this privilege. The public were admitted to the grounds, either by paying money upon each admittance, or by tickets given to them by the fellows. Once in the week, for three months in the year, the Society procured the attendance of a musical band:

Held, that the Society was not exempt from rate, under the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1, the premises not being occupied exclusively for the purposes of science.

The Society was supported in part by annual contributions from the fellows and subscribers. Each fellow was entitled to personal admission, with a specified number of companions, on every day, and could also give admission at certain times by written orders and tickets, to which he was entitled: and fellows were also entitled to purchase tickets giving free admission to the bearer. Subscribers also were entitled to purchase annually an ivory ticket, admitting a named person of their family, with a companion.

Semble, that the annual contributions by the fellows were not voluntary contributions within the meaning of sect. 1, inasmuch as the fellows and subscribers obtained a benefit, not purely scientific, in consideration of the payments.

THE parish of St. Marylebone in the county of Middlesex is governed by several local Acts of Parliament (2), in pursuance

(1) Cited, *In re University Club* (1887) 18 Q. B. D. 720, 730, 56 L. J. Q. B. 462, 56 L. T. 909; *Inland Revenue Commissioners v. Forrest* (1890) 15 App. Cas. 334, 338, 60 L. J. Q. B. 281, 63 L. T. 36; *Art Union v. Savoy Overseers* [1894] 2 Q. B. 609, 63 L. J. M. C. 253, 71 L. T. 40; *Savoy Overseers v. Art Union* [1896] A. C. 296, 65 L. J. M. C. 161, 74 L. T. 497.

(2) 35 Geo. III. c. 73, 46 Geo. III. c. xc. (local and personal, public), 51 Geo. III. c. cli. (local and personal, public), 53 Geo. III. c. clxiii. (local and personal, public), 1 & 2 Geo. IV. c. xxi. (local and personal, public), 3 Geo. IV. c. lxxxiv. (local and personal, public), 6 Geo. IV. c. 124, 7 & 8 Geo. IV. c. lxxxix. (local and personal, public).

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whereof the vestrymen of the parish made a rate, on 19th June, 1852, upon the occupiers of lands and buildings in the parish, included *in which were the land and buildings in the occupation of a chartered society called the Zoological Society of London.

The Society, on 28th October, 1843, obtained the certificate of the barrister appointed by stat. 6 & 7 Vict. c. 36, that the Society was entitled to the benefit of exemption from county &c. rates, in respect of lands and buildings occupied by them; which certificate was duly sent to the clerk of the peace of the county, confirmed, and filed in 1843. After the making of the said rate, the Society appealed to the vestrymen of St. Marylebone against the same: but, the Society not being satisfied with the determination of such vestrymen, and having given notice of their intention to appeal to Sessions, the vestrymen and the Society agreed, by consent, and by order of COLERIDGE, J., to state the facts for the opinion of this Court, in a case, which was substantially as follows.

The Zoological Society was incorporated by Royal charter on 27th March, 1829, "for the advancement of Zoology and Animal Physiology, and the introduction of new and curious subjects of the animal kingdom."

The land and building occupied by the Society in the parish of St. Marylebone consist of a piece of land situate in the Regent's Park, containing in the whole $25\frac{1}{4}$ acres, and of buildings, houses or receptacles for housing animals, mostly imported by the Society from foreign parts; portions of which buildings are fitted up and used as the residences of keepers; as also aviaries, a museum for stuffed birds and animals, a porter's lodge, and greenhouses.

The management of the affairs of the Society is vested by the charter in a president, treasurer, secretary *and council; such council to consist of 21 fellows including the president, treasurer and secretary.

By one of the Society's bye-laws, the admission fee of a fellow is fixed at 5*l*. The annual contributions of those elected before 6th December, 1832, at 2*l*., and the composition in lieu thereof at 20*l*.; the annual contribution of fellows elected after that date is fixed at 8*l*., and the composition at 30*l*. By another of the bye-laws, "ladies may be admitted as fellows upon the same terms, with the same privileges, and under the same regulations in all respects as gentlemen." At the date of the rate, the number of fellows was 1,650, of whom 86 were ladies.

By another of the bye-laws it is provided that "no dividend, gift,

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division, or bonus, shall be made by the Society, unto or between any of its members." Another of the bye-laws provides for the admission of annual subscribers, to be elected by the council, the annual contribution of such subscribers to be 3*l*. The bye-laws also provide for the admission of honorary, foreign and corresponding members, none of them to be liable to any fees or contributions.

Fellows, annual subscribers, honorary, foreign and corresponding members, are entitled to one copy of the scientific Proceedings of the Society on application at the office, and are entitled to purchase the Transactions and other publications of the Society at 25 per cent. less than the price charged to the public. They may obtain, on the payment of one guinea annually, an ivory ticket which will admit a named person of their immediate family to the gardens and museum, with one companion daily. Each fellow is entitled to personal admission with two companions on every day. On a *Saturday he may give written orders for admission to two persons, instead of a personal introduction; and on Sunday may be accompanied by two persons, and may give two written orders for admission. Each fellow has twenty tickets, which such fellow signs, and each of which admits one person on any one day in the year.

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They may have a transferable ivory ticket, admitting two persons, available throughout the whole period of fellowship, on payment of 10*l*. in one sum. They may also obtain any number of tickets, in addition to those to which they are entitled, for the free admission of the bearer at any time except on Sundays, without their personal introduction, on payment of one shilling per ticket for adults, or sixpence per ticket for children, at the office of the Society, No. 11, Hanover Square.

The Society also, on special application to the council, gives gratuitous admission annually to about 10,000 children belonging to the charity schools of London and the vicinity. The Society also gives free admission to students at the Royal Academy, at the School of Design, and to all artists native and foreign who are properly recommended as likely to benefit by the privilege. And the Society has presented many valuable subjects, which have died in their menagerie, and also subjects from their museum, to the provincial and metropolitan collections of natural history.

The gardens and museum of the Society are open to the public every day except Sundays; and the price charged for admission

(which is paid at the entrance gates) is one shilling for adults, and for children sixpence, except on Monday, when it is sixpence for all. During Easter week the charge is sixpence every day, except on Saturday, when it is one shilling. This reduction is *advertized in the daily papers ; and placards are posted up, announcing the same. On Sundays, throughout the year, members and persons with orders or introductions obtained as aforesaid are alone admitted.

Confectionery and other refreshments are sold in the gardens by a Mr. Masters, who for some years past has carried on that business by permission of, and on making an annual payment to, the Society, under agreement with the Society. The agreement in that behalf, in force when the rate appealed against was made, was the following.

The case set out the agreement. The following are extracts.

“ An agreement made this 29th day of March, 1852, between the Zoological Society of London, of the one part, and Thomas Masters, of ” &c., “ confectioner, of the other part, as follows.

“ The said Zoological Society, for the considerations hereinafter contained, hereby agrees to grant, and the said Thomas Masters to take from them, the privilege of selling confectionery and other refreshments in the confectionery rooms at the gardens of the said Society in the Regent's Park, and such accommodation, in relation thereto, as heretofore enjoyed by him, the said Thomas Masters, at the said gardens, for the year commencing on the 1st day of April next ensuing the date hereof, and ending on the 31st day of March, 1853. And, in consideration of such privilege, the said Thomas Masters agrees to pay to the said Society the sum of 400*l.*, and an additional sum of 6*l.* for every 10,000 visitors at the said gardens over and above 450,000 during the said period: the said sum of 400*l.* to be paid at the times following, that is to say: 200*l.*, part *thereof, on or before the 31st day of March instant, and before the privilege hereby given to the said Thomas Masters shall be exercised by him ; and the remaining sum of 200*l.* on or before the 1st day of June next; and the additional sum of 6*l.* for every 10,000 visitors ” &c. “ to be paid at the times following: that is to say: the first payment thereof to be made on the 1st day of the month next ensuing the day on which the aggregate number of visitors to the said gardens, computing from the said 1st day of April next inclusive, shall amount to the full number of 460,000 ; and the succeeding payments to be made on the 1st day of each month next ensuing the day on which the visitors to the said gardens shall from time to time amount in number to 10,000 complete over and above

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the said number of 460,000." Provisions for evidence of the number of visitors. * * Provision enabling the Society, in case of non-payment by Masters, or default in the observance of any of the agreements, or of his being, by himself or servants, guilty of any misconduct in the exercise of the privileges granted, to determine the agreement by notice. " And it is hereby lastly declared that this agreement shall not operate as a demise to the said Thomas Masters, but merely as a right of entry upon the premises of the said Society for the purposes hereinbefore mentioned." The common seal of the Society was affixed to the agreement, which was signed and sealed by Masters.

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One of the buildings called refreshment rooms in the above agreement is situate in the parish of Saint Pancras; two others are situate in Saint Marylebone. The first of these latter is a wooden building, about nine feet by seven at the base, and nine feet high; and it is closed by shutters and a door, and is opened by Mr. Masters at 9 a.m., and is locked up by him at sunset; that being the period during which the gardens are opened, and during which the right of selling mentioned in the *agreement is exercised by him. The third is a wooden covered stall.

In the year 1851 the Society permitted Mr. Gould to build a room in the gardens. Mr. Gould exhibited therein his collection of humming birds: and he was allowed to, and did, charge for admission to view his said collection sixpence to each person (excepting fellows), in addition to the money paid to the Society by each person for entering the gardens. This continued till October, 1851. In the following year, Mr. Gould allowed the humming birds to be exhibited by the Society in their gardens, without any additional charge being made to visitors to the gardens. The Society, at the end of 1851, used the materials of Mr. Gould's building in constructing a fresh building for exhibiting the birds in 1852. The success of Mr. Gould's exhibition appears by the report of the council, read on the 29th April, 1852, which report, as well as the accompanying report of the auditors of accounts, and the report read on the 29th April, 1851, and the auditor's accounts accompanying the same, and the report read on the 29th day of April, 1853, and the auditor's accounts accompanying the same, may be referred to and used by either party on the argument of this case (1).

(1) Of these, parts only of the report of 1851 were referred to in the argument. They were as follows. "The characteristic increase which has had

The Society occasionally sells animals and skins to the amount of several hundred pounds sterling a year. In 1850, the sales realised 724*l.* 7*s.* 6*d.*; and, in 1851, 269*l.* In 1853, the Society sold for 250*l.* a giraffe, bred in the gardens.

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The Transactions and Proceedings of the Society, and papers upon topics of Zoological Science, Physiology and Anatomy, illustrated, are published by the Society and sold to the public. Fellows have the privilege of receiving gratis one copy, yearly, of the Proceedings, and the privilege of purchasing any number of all publications *of the Society at a price 25 per cent. less than that charged to the public. The number of copies of the Proceedings usually printed is 1,000; of which number the number distributed gratis to fellows is 525, and the number purchased by fellows, which have illustration, is 169; and the number purchased by the public is 25. The number of copies of the Transactions usually printed is 500, of which the number purchased by fellows is 61, and the number purchased by the public is 25; and 60 copies are given to public libraries and societies. These Proceedings and Transactions relate to Zoology, and may be referred to by either party on the argument.

[*816]

The income derived from the fees, subscriptions, admissions, rents, sale of books, and all other moneys received by the Society, is applied as stated in the aforesaid printed reports (house and office expenses): and those reports include, among other things, the cost of tea and coffee for the fellows and other persons present at the fortnightly evening meetings of the Society. The number of fellows who attend these meetings is usually from twenty to

so important an effect upon the finances of the Society is however to be found in the sums contributed by the public for admission to the gardens. The sum of 10,462*l.* 9*s.* having been derived from this source presents the remarkable increase of 5,810*l.* 19*s.* over the receipts of 1849, and of 6,935*l.* 18*s.* 6*d.* over those of 1847, which were the smallest ever taken, while it is only exceeded by those of 1831 (11,425*l.*), which are the largest.

"As to the receipts of the current year from the 1st of January, notwithstanding the unfavourable weather in March, already exceed those of the corresponding period of 1850 by 262*l.*, it is confidently hoped that the

flourishing condition of the institution is now so extensively known, and public interest so thoroughly awakened in its favour, that this source of income is preserved from the adverse fluctuations which had formerly influence over it."

"The great financial success which has been already noticed as distinguishing the summer of 1850, and the consideration of the peculiar circumstances of the coming summer, confirmed the opinion of the council as to the desirableness of thoroughly developing the manifold attractions of which the garden establishment is capable." * * *

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twenty-five; and the other persons present are usually from six to eight friends of such fellows.

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A band usually plays in the gardens on every Saturday during the months of June, July and August. The musicians, while performing, stand in the parish of Saint Pancras near the confines of the two parishes; but the company who surround them and listen to their music stand, some in Saint Pancras and some in St. Marylebone, while so listening. The expenses of this band were, as appears by the auditor's report, in the year 1850, 308*l.* 8*s.*; and, in 1851, 385*l.* 15*s.* No extra charge is *made for admission on those days. The Society advertises in *The Times* and other papers the days on which the band will play, in conjunction with other matter. The following is a copy of an advertisement in *The Times* of the 23rd July, 1851.

“Zoological Gardens, Regent's Park. The Uran Utan presented by the Governor of Singapore is exhibited daily from 12 till 6 o'clock, together with the elephant calf and hippopotamus presented by his Highness the Viceroy of Egypt. The band of the 1st Life Guards will perform, by permission of Colonel Hall, at 4 o'clock on every Saturday until further notice. Admission, one shilling; on Mondays, sixpence.” Printed placards were also placed in 1851 and 1852, in various parts of London, at railway stations, in omnibuses, &c., announcing that the band would play, in conjunction with other matter. The attendance of company on the days the band plays is much greater than on other days, Monday excepted, on which day the attendance is greatest, owing to the charge being sixpence only.

During the summer of 1850, two Egyptian Arabs, who came over in charge of a collection of quadrupeds, birds and reptiles, partly a gift of Abbas Pasha, and partly a purchase by the Society, exhibited, in these gardens, snake charming, as practised by their tribe; which exhibition was also advertised by the Society.

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About three acres of the land belonging to the Society, towards the upper part of the gardens, and not at present required for the animals, are cultivated as a flower garden, in which flowers are brought to a state of great perfection: and there are greenhouses, pits and other premises, fitted up and used for the preservation of the garden stock during the winter. The *expenses of the flower garden amount to a considerable sum. About one third of the flower garden is in the parish of Saint Marylebone; and the remaining two thirds is in the parish of Saint Pancras. * * *

If the Court should be of opinion that the appellants have established their claim, under stat. 6 & 7 Vict. c. 36, to exemption from liability to be rated, the rate shall be amended by striking out the assessment therein of the appellants: but, if otherwise, the rate shall be confirmed.

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Pashley, for the respondents:

This Society fails to satisfy the principal requisites of stat. 6 & 7 Vict. c. 36, s. 1. It is questionable whether it is "instituted for purposes of science, literature, or the fine arts exclusively;" at any rate the premises are not "occupied by it for the transactions of its business, and for carrying into effect its purposes." Even admitting that the object of the incorporation, as expressed in the charter, "the advancement of Zoology and Animal Physiology, and the introduction of new and curious subjects of the animal kingdom," is exclusively scientific, it is obvious that the premises are applied to purposes not scientific. The report of 1851 points out that the great increase of income has arisen from the sums contributed by the public for the admission to the gardens: and this is attributed to the improvement in respect of the objects *exhibited and of the conveniences afforded to visitors. Such an exhibition, though affording a laudable recreation, cannot be said to have an exclusively scientific purpose; similar exhibitions took place for the amusement of the populace in the Roman circus. It might as well be said that an exhibition of fireworks was made for the exclusive object of promoting the science of pyrotechny. One attraction dwelt upon is the state of the walks in the garden. Music also is resorted to as a means of attraction: and this constitutes a stronger case against the exemption than that of *Russell Institution v. Vestry of St. Giles* (1). But, further, underletting to the person who supplies refreshments is inconsistent with the occupation of the premises *exclusively for scientific purposes: and on this point *Purvis v. Traill* (2) is a direct authority. Perhaps, after *Churchwardens of St. Anne v. Linnean Society* (3), it cannot be maintained that the contributions are not in part voluntary.

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(LORD CAMPBELL, Ch. J.: The contributions are not the less voluntary from the contributors having bound themselves to pay. But it may be worth considering whether that which is paid

(1) *Ante*, p. 565.

(3) *Ante*, p. 764.

(2) 77 B. R. 639 (3 Ex. 344).

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for is scientific improvement, or personal benefit in the nature of profit.)

Certainly the privileges which a fellow purchases are of value ; as, for instance, the power of giving admissions which must otherwise have been paid for.

Willes, contra :

The general object of the Society is undoubtedly scientific. That character is not destroyed by the scientific exhibitions being rendered amusing. The resort of visitors produces no emolument to the individual members. The refreshment rooms are merely subsidiary : at scientific meetings, as, for instance, at those of the Royal Society, refreshments are provided. It is not necessary to inquire as to the effect of the exhibition of the humming birds by Mr. Gould, the exhibition having, before the laying of this rate, been managed merely by and for the Society. The experiments upon charming snakes are closely connected with investigations into the habits of the animal ; the Arabian attendants upon the quadrupeds must also be serviceable in preserving the animals in a proper state, and in making known their habits. No argument in favour of the rate can be derived from the fact that the gardens are, to a certain extent, ornamentally laid out : there can be no *deviation from the scientific purpose in making use of land not yet wanted : the banks of railways are commonly made use of as gardens or hay fields ; but it cannot be said that this alters the nature of the undertaking.

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(LORD CAMPBELL, Ch. J. : You are, in fact, claiming to exempt from rateability these three acres, and so to burthen the parish.)

If the Court thinks that the exemption is too widely claimed, the rate should be confined to so much of this land as may be considered to be in excess of the scientific purpose. The introduction of music of course constitutes an attraction : but the parties who are so attracted are not the less instructed.

(LORD CAMPBELL, Ch. J. : A man who goes to a play is perhaps instructed : but can it be said that the play is exhibited for the exclusive purpose of instruction ?)

The argument for the rate proves too much : no science is pursued

without something being done which is not directly an act of scientific investigation.

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Pashley was not called on to reply.

LORD CAMPBELL, Ch. J.:

I wish, at the outset, to express my opinion that the Society is deserving of the highest commendation: it has, I have no doubt, essentially contributed to the advancement of natural science; and I hope that it may long flourish. But I consider that it does not come within the statute. It tends to advance the science: but can that be said to be its exclusive object? We must exercise our judgment upon this as a matter of fact; and, doing so, I see that the Society has also another object, namely amusement, amusement of a most innocent and laudable kind, but *still differing from the pure pursuit of science. If I were called upon to decide the point, I should say that the contributions were not voluntary. I believe one of my learned brothers, who subscribes, looks to the amusement which he and his family and friends are to derive from their access to the gardens; and such subscriptions, it seems to me, are not voluntary contributions to the Society within the meaning of the Act. Then we find that the gardens are not exclusively devoted to objects which, if they were the sole objects, would give the Society the character of a scientific institution, but to objects also which are not necessary or even subsidiary to the promotion of science. I am therefore of opinion that the claim to immunity is not substantiated.

[*822]

ERLE, J.:

I think that this Society is not within the statutory exemption. It does promote science; and it does good by creating a predilection for science: but I cannot say that the premises are occupied exclusively for purposes of science. They are clearly occupied also for purposes which are not sufficiently proximate to that of the promotion of science to support the exemption. As to the question, whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects.

CROMPTON, J.:

I am of the same opinion. I am glad that the purposes of the

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Society are not confined to such as are merely scientific: I am not sure that the additional object which is attained, that of bringing people *together for rational amusement and recreation, is not more important than the scientific object. But, as the Society is not exclusively devoted to scientific purposes, the exemption cannot be sustained.

(No fourth Judge was present.)

Judgment for respondents, with costs.

1854.
May 31.
—
[823]

REG. v. INHABITANTS OF BURGATE.

(3 EL. & BL. 823—829; S. C. 2 C. L. R. 1484; 23 L. J. M. C. 143; 18 Jur. 875.)

M., seised in fee of land, devised it to A. for life, and bequeathed all his personalty to A., and directed that, after A.'s death, the land should be sold within six months, and equally divided between devisor's six children; if any of the children should be dead, the share to be equally divided between the children of such child: and executors were named; but no estate or power of sale was expressly given to them.

The devisor survived A., and left two daughters, and grandchildren by another daughter, some being minors at the time of the devisor's death. The land was sold more than seven months after devisor's death; and, during the whole interval, one of the surviving daughters, with her husband, resided on the land:

Held, that a settlement was gained by this residence.

On appeal against an order of two justices, removing Ann Torbold, widow, and her three children, aged respectively twelve, eight and six years, from the parish of Mellis to the parish of Burgate, both in Suffolk, the Sessions confirmed the order, subject to a case, which was, in substance, as follows.

William Torbold, the husband of the pauper Ann Torbold, previously to his marriage with her, acquired a settlement in the appelland parish of Burgate, by hiring and service for a year ending at Old Michaelmas, 1826.

But the said Ann Torbold was the daughter and one of the coheirresses of John Mullinger, late of the parish of Wortham in Suffolk. At the time of her marriage with W. Torbold, which took place in June, 1829, she resided with her father in a house of his own. He was seised in his demesne in fee simple of this house, and *of the premises thereunto belonging, and also of about an acre of land adjoining the same: and the whole was situate in the parish of Wortham. Upon the marriage of W. and A. Torbold,

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W. Torbold came to reside with his wife and her father in the house in question; and all of them continued to reside together until the death of John Mullinger. He died on or about 31st August, 1844, having first made and published his last will and testament in writing, duly executed and attested for passing real estate. The following is an extract.

“I, John Mullinger,” “do declare this to be his last will and testament, however imperfect it may be written. Itim, I give and bequeath to my said beloved wife Ann Mullinger my freehold estate and all that appertain to it during her naturall life, leying in Blow Norton in the county of Norfolk. Itim, I also give to my said beloved wife Ann Mullinger my other freehold estate, and all that appertain to it, leying in Wortham in the county of Suffolk, during her natural life. Itum, I also give unto my beloved wife Ann Mullinser all my live and ded stock, with goods and chattels, bills and bonds, corn, wither in the barne or on the land, to do with as she please: but, providing their should not be anuff money to bury me and pay all just bills, the same shall be taking out of the said goods and chattels. Itum, after my beloved wife is deceased, the same two freehold estates shall be sold within six months, and be equily divided betwin my six children; and providing any of them shold be ded, their farther or moother’s share to be equily divided betwin their children. Ware of i chose for my executors or executricks Ann Mullinger, my bloved wife, and William Hogg, my son in law, ware of thay shall be paid their reasonable expenses.”

Ann Mullinger, the wife of the testator, predeceased him, and died in or about January, 1842. The only descendants of the testator alive at his decease were his daughter the pauper Ann Torbold, his daughter Mary Green, since deceased, but then living, married to Charles Green, and his grandchildren, some of whom, at the time of the testator’s death, were minors, being the lawful issue of his daughter Susannah Hogg, then deceased, and William Hogg her husband, Susannah Hogg having intermarried with William Hogg on 5th July, 1814, and having died in March, 1829.

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The property of the testator described in his will as his freehold estate lying in Wortham in Suffolk consisted of the house and premises and land above mentioned.

W. Torbold, and the pauper A. Torbold, his wife, and his family, continued to reside and sleep in the said house, and occupied the said house and premises and land from the death of the testator until the same were sold, under the provisions of the will, in April,

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1845 : and, on the sale, W. Torbold and Ann his wife received one third part of the purchase money.

The pauper children are the lawful issue of the marriage of W. Torbold and A. Torbold, and are of the ages above mentioned (twelve, eight and six), and unemancipated.

W. Torbold died on or about 3rd January, 1852.

Neither W. Torbold, nor A. Torbold, his wife, nor their children, ever resided at so great a distance as ten miles from the parish of Wortham.

[*826] The question for the opinion of the Court of Queen's Bench is : Whether the facts stated show a settlement of Ann Torbold, the widow, in the parish of Wortham. *If the Court shall be of opinion in the affirmative, then judgment is to be entered for the appellants : but, if not, for the respondents.

N. Palmer and Power, in support of the order of Sessions :

[827] The question is, whether the pauper Ann took such an interest under the will as to enable the residence in Wortham to confer a settlement. It is clear that the deviser meant to dispose of all his realty and personalty. His wife had an absolute property in the personalty, and a life estate in the land, which includes the land at Wortham. The executors must be intended to take all that in which the wife had only a life interest : there is no appearance of any intention to give an intermediate interest. A devise, where the intention is clear, will not be construed so strictly as a conveyance *inter vivos*. If the executors did not take the legal remainder in fee, it was undisposed of, and went to the heir-at-law ; but the heir took no beneficial interest. * * The heirs would merely be the persons from whom the executors of the will would take the estate, and would have neither an interest entitling them to reside nor a duty requiring them to do so. The heirs could not be charged with a breach of trust.

(LORD CAMPBELL, Ch. J. : Suppose rent became due before sale.)

The executor would distribute it among the parties entitled to the proceeds of the sale. But, further, the executors took the fee. They would have to convey a fee simple to the vendee under the will.

(LORD CAMPBELL, Ch. J. : Do you contend that there can be no power of sale without a legal estate in the land ?)

In *Shapland v. Smith* (1) (referred to in *Silvester d. Law v. Wilson* (2)) it was held that, where trustees had to pay rates, taxes and repairs, and then pay over the surplus to A., they took the legal estate. The executors here would be bound to collect the rents, till the sale. Nor is there any settlement in respect of the pauper's equitable interest. In *Reg. v. St. Margaret, Leicester* (3), land was devised to a trustee, in trust to sell and divide the estate among the devisor's children, and to the separate use of such female children as should be married: and it was held that the husband of one of such children, residing on the land before sale, did not *gain a settlement; and *Rex v. Natland* (4) was there overruled.

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(LORD CAMPBELL, Ch. J.: How do you collect from this will that the sale is to be made by the executors?)

That appears from *Forbes v. Peacock* (5). A party entitled to the proceeds of the sale of an estate may, in general, elect to hold the land: but that cannot be so here, because the pauper was one only of persons so entitled, some of whom were minors and incapable of electing. The pauper was therefore merely a legatee of personalty.

(ERLE, J.: In the argument in *Reg. v. St. Margaret, Leicester* (3), *Rex v. Wivelingham* (6) was mentioned.)

The devisee in that case was capable of electing to take the land, and did elect.

(ERLE, J.: One devisee was a married woman.)

That point was not brought before the Court.

(CROMPTON, J.: No consent of the other devisees was necessary here: the wife was entitled to reside as heir.)

It is not found that the residence was in fact in that character.

Dasent and *H. Mills, contra*, were not called on.

LORD CAMPBELL, Ch. J.:

It seems to me quite clear that there is here a legal title to the land coupled with a right to the proceeds of the sale.

(1) 1 Br. C. C. 75.

(2) 1 R. R. 519 (2 T. R. 444).

(3) 2 Q. B. 559.

(4) Burr. S. C. 793.

(5) 63 R. R. 694 (11 M. & W. 630).

(6) 2 Doug. 767.

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ERLE, J. :

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I think a settlement was gained. As I construe the will, the legal estate descended to the pauper, with a right to reside till the power of sale should be exercised. The only case, where a pauper has been removed from land in which he has any *interest, is *Reg. v. St. Margaret, Leicester* (1). Without saying more of that decision, the legal estate is here in the pauper.

CROMPTON, J. :

The pauper had a clear legal estate in the land, and could not be removed.

(No fourth Judge was present.)

Order of Sessions quashed.

IN THE EXCHEQUER CHAMBER.

1854.
June 1.

BOUGLEUX v. SWAYNE.

(3 EL. & BL. 829—832 ; S. C. 18 Jur. 894.)

[This case, which related to the question of security for costs on an appeal, is superseded by the provisions of R. S. C., Order LVIII., r. 15 ; Order LXV., rr. 6 and 6A.]

IN THE QUEEN'S BENCH.

1854.
June 1.
[832]

STORM v. STIRLING (2).

(3 EL. & BL. 832—844 ; S. C. 23 L. J. Q. B. 298 ; 18 Jur. 788 ; 23 L. T. O. S. 187.)

Defendant signed, and delivered to plaintiff, a written instrument, containing the following words : “ nine months after date, I promise to pay to the secretary for the time being of the Indian ” &c. “ Society, or order, Company’s rupees, twenty thousand, with interest at the rate ” &c. ; “ and I hereby deposit in his hands twenty-two Union Bank shares,” “ by way of pledge or security for the due payment of the said sum of Company’s rupees, twenty thousand, as aforesaid ; and, in default thereof, hereby authorise the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him ; and out of the proceeds of sale to reimburse himself the said loan of Company’s rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of Company’s rupees, twenty thousand, and interest as aforesaid.”

Plaintiff, at the time of the making and delivering of this paper, and

(1) 2 Q. B. 559.

Chamber, sub nom. *Cowie v. Stirling*,

(2) Affirmed in the Exchequer as reported *post*, p. 797.

thence forward continually till the expiration of the nine months, and ever since, had been secretary of the Society. An action having been brought by him against defendant, after the expiration of the nine months, as upon a promissory note, the declaration averring the plaintiff to have been and to be secretary as aforesaid, and the defendant having denied making the note:

Held, that the instrument was not a promissory note, the payee being uncertain at the time of the making (1).

Quære, whether, independently of this objection, the promise by the maker to pay in default of the deposit making up the sum would have prevented the instrument from being a promissory note? (2).

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FIRST count. That, whereas defendant, on 10th March, 1845, in parts beyond the seas, to wit at *Calcutta in the East Indies, made his promissory note in writing, and thereby promised to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society twenty thousand Company's rupees, with interest at the rate of six per cent. per annum, nine months after the date thereof, which period and the time for payment of the said note had expired before the commencement of this suit; and then delivered the said note to the plaintiff, who, at the time of the making of the said promissory note and from thence hitherto, was and is the secretary of the said Indian Laudable and Mutual Assurance Society: averment that the said sum of twenty thousand Company's rupees was and is of great value, to wit of 2,000*l.* of lawful &c. Breach: Non-payment.

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Plea to this: That defendant "did not make the alleged promissory note."

The plaintiff took issue on this plea. There were also other issues of fact.

On the trial, before Crompton, J., at the Middlesex sittings in Michaelmas Term, 1853, a special verdict was found; of which the parts now material were as follows.

As to the first issue. That the defendant, at a certain place &c. (as in the declaration), made and signed, and delivered to the plaintiff, a document in the words and figures following, that is to say:

"C. 20,000.

"CALCUTTA, 10th March, 1845.

"Nine months after date, I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society, or order, Company's rupees, twenty thousand, with interest at the rate of six per cent. per annum. And I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot,

(1) See now Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7 (2).

(2) See Bills of Exchange Act, 1882, s. 83 (1).

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 [*834]

*by way of pledge or security for the due payment of the said sum of Company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself the said loan of Company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of Company's rupees, twenty thousand, and interest as aforesaid.

“ EDWD. STIRLING.”

(Then followed the numbers of the shares.)

“ No. 33. Due 10/13 Dec. /45.”

That the Indian Laudable and Mutual Assurance Society, in the said document mentioned, is the Indian Laudable and Mutual Assurance Society within in the declaration mentioned; and that the plaintiff, at the time of the making of the said document, and from thence until the time of the commencement of the within mentioned action, was the secretary of the said Society. That the name Edward Stirling, set and subscribed to the said document, is of the proper handwriting of the defendant. That the said sum of twenty thousand Company's rupees, at the time of the making of the said document, and when the same became due, was of the value of 2,000*l.* of lawful money of Great Britain. The special verdict then left the first issue to the Court in the usual form. The findings on the other issues were immaterial to the question now decided.

[835] The case as to the first issue was argued in last Easter Term (1).

Lush, for the plaintiff:

The document is a promissory note. Two objections will be made. First, it will be said that the promise to make good any sum by which the produce of the shares may fall short of the twenty thousand rupees qualifies the original promise, and destroys its character of promissory note. But such an additional engagement has not the effect suggested. In *Wise v. Charlton* (2) an

(1) May 5, 1854. Before Lord Crompton, JJ.
 Campbell, Ch. J., Wightman and (2) 43 R. R. 480 (4 Ad. & El. 786).

instrument, which in other respects was a promissory note, contained a statement that the maker had deposited certain title deeds as an additional security for the sum which he promised to pay: and it was held that this was a promissory note on which the indorsee might sue the maker; PATTESON, J. saying that this instrument was not the less a promissory note from its being also an agreement of another kind.

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(WIGHTMAN, J.: The promisee here was not bound to have recourse to the shares.)

He was not: if that had been a necessary step, perhaps the case might have been like that of an instrument containing a promise to pay money and do another act. * * The engagement is not then satisfied by the mere payment of the money. Here the promisee has an immediate unqualified right to demand the money at the end of the nine months; and the mere payment discharges *the promisor. Besides, the promise to pay the deficiency is no more than the law would imply from the deposit and the debt: the addition therefore goes no further than a mere recital of the fact of the deposit. There is no fresh consideration. Secondly, it will be objected that the party to whom the promise is made is not a designated individual. But the fair meaning of the undertaking is, to pay to the plaintiff, described as being the secretary at the time, if he should be secretary at the maturity of the note.

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(LORD CAMPBELL, Ch. J.: That might be so, if the promise were simply to pay to the secretary, without the addition of the words "for the time being." But, even supposing that the meaning, is an instrument with such a conditional promise a promissory note?)

A promise to pay S. W. and S. D., "stewardesses for the time being of the Provident Daughters' Society," "or their successors in office," was held, in *Rex v. Box* (1), to be rightly described, in an indictment for forgery under stat. 2 Geo. II. c. 25, s. 1, as a promissory note.

(LORD CAMPBELL, Ch. J.: The persons were there designated.

CROMPTON, J.: The Court seems to have rejected the words "or their successors in office," because there could be no such successors.)

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The mention of the name makes no difference. In *Megginson v. Harper* (1) the instrument purported to be a "promise to pay to the trustees acting under the will of" W. B. ; and it was treated as a promissory note.

(LORD CAMPBELL, Ch. J. : Is not this a promise to pay the person who shall be secretary at the maturity of the note ?)

It is payable to order : the plaintiff might have indorsed over at once.

(CROMPTON, J. : If he did not do so, would not the successors,
[*837] *supposing it a promissory note, be entitled to indorse it over ?)

There were no such persons in existence : supposing even that the note is not negotiable at all, the action on it must have been brought by the plaintiff, even if he had quitted office.

(LORD CAMPBELL, Ch. J. : The parties clearly did not mean that.)

The deposit of the shares is into the hands of the plaintiff ; he, "the said secretary for the time being," is to sell the shares "so deposited with him." There is no uncertainty as to the payee in the sense in which the instrument in *Blanckenhagen v. Blundell* (2) was uncertain, where the promise was to pay to J. P. D. or to the plaintiffs.

(LORD CAMPBELL, Ch. J. : Suppose I make a written promise to pay to the person who shall be lord mayor next year.)

That might not be a promissory note.

(LORD CAMPBELL, Ch. J. : The promise would be to pay to the lord mayor for the time being.)

There is no uncertainty on the face of the instrument. The promise here is either to pay to the actual secretary, the plaintiff, or to a person not in being ; and, on the last alternative, it is a promissory note payable to the bearer.

Willes, contra :

As to the objection last discussed. The promise is to pay to the

(1) 39 R. B. 784 (2 Cr. & M. 322).

(2) 2 B. & Ald. 417.

person who shall be secretary at maturity : and the case therefore is not within stat. 3 & 4 Ann. c. 9, s. 1 (1), which includes only promises to pay to any "person or persons, body politic and corporate, his, her, or their order, or unto bearer." * * Now here any one, not the plaintiff, might be secretary at the maturity, in which case, according to the interpretation suggested on the other side, the payment would not be made : indeed the defendant might himself become secretary. In *Megginson v. Harper* (2) the payees were sufficiently and certainly designated by the reference to the will. In *Rex v. Box* (3) the payees were named ; but there was, in addition, an attempt to give a sort of corporate succession ; and this part of the note was rejected.

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(WIGHTMAN, J. : Suppose it appeared sufficiently certain here who would be secretary when the note became due.)

It is possible to conceive a case of that sort, in which the note might be within the statute : perhaps it might be so in the case of a note promising to pay "the chamberlain of London," who is a corporation sole for some purposes, in his corporate capacity.

(WIGHTMAN, J. : Suppose it payable to the secretary of the chamberlain of London for the time being.)

That would not be a good promissory note. It is suggested that the note may be treated as payable to bearer ; but this is not, as in *Gibson v. Minet* (4), the case of a fictitious payee ; nor, as in *Norton v. Ellam* (5), of no payee being mentioned. Besides, the declaration *does not treat the note as payable to the bearer : it is not alleged that the plaintiff is the bearer ; but it is alleged that he was secretary at the time of the making, and is so still : that is, the note is treated as payable to the person, whoever it might be, that should be secretary when the contract should be enforced. Next, as to the other objection. The engagement at the end of the instrument constitutes a contract which cannot pass by indorsement. It does not arise, by implication, upon the other part of the instrument.

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(1) See now 45 & 46 Vict. c. 61, s. 83 (1).

(2) 39 R. R. 384 (2 Cr. & M. 322).

(3) 6 Taunt. 325.

(4) 1 R. R. 754 (1 H. Bl. 569 ; 3 T. R. 481).

(5) 46 R. R. 646 (2 M. & W. 461).

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(LORD CAMPBELL, Ch. J.: Do you contend that there cannot be a good promissory note which is not negotiable?)

No.

(LORD CAMPBELL, Ch. J.: Then, setting aside the question of negotiability, what is there here which the law would not imply upon the deposit of the shares?)

Suppose the note not paid for six years; and that the last share is sold after the six years have expired, but within six years of the commencement of the action, and the debt is still not fully satisfied: the Statute of Limitations could not be pleaded to the last contract, though it might to a promissory note.

(WIGHTMAN, J.: If any of the shares were sold within six years of the commencement of an action on the note, might not that be set up as part payment in answer to a plea of the statute?)

A payment which the payee could not help making would not be an acknowledgment, and therefore would not furnish an answer to a plea of the statute: if a note were given by way of payment, the acknowledgment would date from the giving it, not from the maturity: this is illustrated by *Waller v. Lacy* (1). * * *

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Lush, in reply:

The question of negotiability is unimportant, as that quality is not essential to the character of a promissory note.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered the judgment of the COURT:

It appeared, on the special verdict in this case, that the document treated in the declaration as a promissory note, and upon which the action was brought, was in the following form (his Lordship then read the instrument as set out *ante*, p. 789). It was found by the special verdict that the plaintiff, at the time of the making of the above document, and from thence until the commencement of the action, was the secretary of the above mentioned Society.

The only question in the case was, Whether the document in question can be treated as a promissory note. Two objections were taken to its being so treated.

First: that it was not payable to any certain person, but to the person, if any, who at the time when the note should become

payable might fill the situation of secretary to the Company: and, secondly: that the additional promise to pay the deficiency in the event of a sale of the deposited Bank shares prevented the instrument from being a promissory note.

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With reference to this latter objection, it was argued, on the part of the defendant, that the promise to pay the deficiency in the event of a sale after default would give a new cause of action for such deficiency, after the original cause of action had been barred by the Statute of Limitations; that such promise was part of an entire agreement; that it was not transferable, and prevented the instrument from being a promissory note. It was said, on the other hand, that the promise to pay the balance was no more than what the law would have implied; that there was no consideration for such additional promise; and that, even if there was such an additional promise founded on a sufficient consideration, still, as it did not qualify the promise to pay the amount of the note at the end of the nine months, and was a collateral promise with reference to the collateral security, it would not prevent the document which contained a positive promise to pay at the end of nine months from operating as a promissory note between the parties, even if it prevented it being assignable under the statute of 3 & 4 Ann. c. 9, s. 1 (1). *Wise v. Charlton* (2) was cited, as showing that such collateral security, not qualifying the promise to pay at the given time, did not prevent the document operating as a promissory note. And the judgment of PATTESON, J. in that case was relied on, in which he says, "This is not the less a promissory note, from its being also an agreement of another kind."

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It becomes, however, unnecessary for us to decide or express any opinion on this part of the case, as we are of opinion that the first objection is fatal to the plaintiff's case.

The nature and every definition which we find in the books of a promissory note show that it must contain an express promise to pay to a person therein named or designated, or to his order or to bearer. See Byles On Bills, 6th edit. p. 4; *Colehan v. Cooke* (3); 2 Bl. Com. 467. If the person to whom, or to whose order, it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note unless it can be treated as payable to bearer.

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It was urged, on behalf of the plaintiff, that we might treat this

(1) See now 45 & 46 Vict. c. 61,
s. 83 (1).

(2) 43 B. R. 480 (4 Ad. & El. 786).

(3) Willes, 396.

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as a note made payable to the plaintiff, who at the date of the document was the secretary of the Society, by his description as such secretary. And it was said that the subsequent part of the instrument, in which it is said that the plaintiff deposits in his hands, and that he authorizes the said secretary for the time being forthwith to sell, points to the then secretary as the person to whom alone the promise is made, and to whom alone the note is payable.

There is no doubt, upon the authorities, that it is quite sufficient to make a note by a description or *designatio personæ* of this kind: but we do not think that we can put the above construction on the document now before us. The use of the words "for the time being" in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument, satisfy us that the payment was to be made to the individual who, at the time of the instrument falling due, should fill the situation of secretary of the Company, and not to the plaintiff, unless he happened to *be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words "the secretary for the time being" meant the now secretary: but we think that the words were used for the very purpose of excluding that construction.

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The case of *Rex v. Box* (1), which was relied on by the plaintiff, is clearly distinguishable from the present. There the note was payable on demand to A. B. and C. D., by name, "stewardesses" of a provident society, "or their successors in office." There the parties to whom the note was given were designated by name; and the description of them as stewardesses, which it was said they were not legally, being mere matter of description, did not alter the promise to pay them on demand: and the Judges said that, although they could have no legal successors as stewardesses, still their executors or administrators might sue. In the present case, as we read the document, the money was never to become payable to the plaintiff, and he was never to have any right upon the instrument, unless he happened to fill the situation of secretary to the Society at the end of the nine months. In *Rex v. Box* (1) the note, as construed by the COURT, gave an immediate right of action to the payees named, on which they might have immediately sued; and the COURT seems to have thought that the mention of the successors, who could have no legal existence, might be rejected, so

that it did not destroy the immediate legal right expressly given to the *plaintiffs on demand. Here there is no right given to the plaintiff, except by the words promising to pay "the secretary for the time being." It was not suggested, in that case, that the note would be good if it amounted to such a floating contingent promise as we think that the words are intended to import in the case before us.

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It was suggested also, in the argument, that, if there were no payee who could sue, the note might be treated as payable to bearer. But we think that in so holding we should give a meaning to the note contrary to the clearly expressed intention of the maker. This is not a case of fraud, or of a fictitious payee: but the defect is, that it is a promise to pay some person to be ascertained *ex post facto*; and we know no authority to show that under such circumstances we can hold this instrument to be a note payable to bearer, because, though valid perhaps as an agreement, it cannot be enforced as a promissory note. The promise is to pay to, or to the order of, an uncertain person. But, if founded on good consideration, it may probably give rights legal or equitable to the Society. But we think that we should be making a new instrument if we were to hold it a promissory note payable to bearer; and the case does not fall within any of the decisions cited on this branch of the argument.

As we think, therefore, that this is not a promissory note, our judgment is for the defendant.

Judgment for defendant.

IN THE EXCHEQUER CHAMBER.

COWIE *v.* STIRLING (1).

(6 EL. & BL. 333—337; S. C. 25 L. J. Q. B. 335; 2 Jur. N. S. 663.)

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the instrument was not a promissory note, the payee being uncertain at the time of the making.

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May 1.
[6 EL. & BL.
333]

* * * * *

JOHN COWIE, the administrator, with the will annexed, *of the plaintiff below (2), suggested error in the Court of Exchequer Chamber: which the defendant denied.

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The case was now argued.

(1) See footnotes, p. 789, above.

(2) *Storm v. Stirling*, p. 788, above.

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Lush, for the party suggesting error (administrator of plaintiff below):

The judgment of the Court below proceeds on the ground that the instrument is not a promissory note because the money is not made "payable to any certain person, but to the person, if any, who at the time when the note should become payable might fill the situation of secretary to the Company." It is true that the expression "secretary for the time being" would, if standing alone, be ambiguous. But then follows the statement, "I hereby deposit in his hands twenty-two Union Bank shares" &c.: that shows that, by the secretary for the time being, is designated the secretary at the moment of making the note and depositing the shares: and this is enough, without any name. The additional words, "for the time being," would not destroy the effect of what had preceded: *Wise v. Charlton* (1): if they did, they would be rejected, *ut res magis valeat quam pereat*. The then actual secretary is "the said secretary" who is authorized to sell the shares; and the contingency of his ceasing to be secretary is provided for by the note being made payable to order: the person taking the note might indorse it over forthwith.

C. E. Pollock, contra, was stopped by the Court.

[337] JERVIS, Ch. J.:

I am clearly of opinion that this judgment should be affirmed. Whatever desire we may feel to aid in enforcing a contract, we must hold that, to make a promissory note, there must be a payee ascertained by name or designation. Now, as was said in the Court below, this money is made payable, not to the then secretary, but to the person who should be secretary nine months thence, when the payment was to be made. That was the clear intent. As to the shares being deposited in the hands of the present secretary, that is merely for security. The payment itself is to be made to the person who shall be secretary. So that, even if we look at the collateral agreement (which I think we cannot do), we find no certain payee.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., and CROWDER, J., concurred.

Judgment affirmed.

(1) 43 R. R. 480 (4 Ad. & El. 786).

IN THE QUEEN'S BENCH.

KERSHAW *v.* KERSHAW.

(3 El. & Bl. 845—858; S. C. 23 L. J. Q. B. 353; 2 W. R. 522; 23 L. T. O. S. 207.)

K., being seised in fee, devised (by will made before 1838) to her nephew A., to hold to him for his life without impeachment of waste; and, from and after his decease, to "the first son of the body of" A., "to hold the same to such first son for and during the term of his natural life only, without impeachment of waste. And, from and after the decease of the last mentioned first son of the said" A., "I give and devise all the said estates to the first son of the body of such last mentioned son, with remainder to the second, third and all other sons of the body of such last mentioned son, for ever, the elder being always preferred to the younger. And, in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs for ever."

At the time of the making of the will, A. had two sons and two daughters. B., the elder of these sons, survived K., but had no children till after K.'s death; after which he had both sons and daughters:

Held that B. took only an estate for life, and could not therefore, by a disentailing deed, convey an estate for more than his own life.

That B.'s sons took successive estates tail in remainder, by purchase, and that, they having died without issue, or disentailing, the land went to the right heirs of K.

EJECTMENT for a messuage, tenement and appurtenances in Lancashire. On the trial, at the Liverpool Spring Assizes, 1854, before Platt, B., a special verdict was found, of which the material parts were as follows.

Jane Taylor, before and at the time of the making her last will and testament hereinafter mentioned, and at the time of her death, was seized in her demesne as of fee of and in the messuage and tenement, with the appurtenances, in the writ in this action mentioned. And, being so seized, she, on 28th March, 1807, duly made and published her last will and testament in writing, duly attested and subscribed according to law, according to the tenor and effect following.

"First, I will and direct that all my just debts, funeral and testamentary charges and expenses, together with the charges of the probate of this my will, shall be paid and discharged by my executors out of my personal estate. And I give out of my personal estate the following legacies or sums of money, that is to say" &c. (specifying them, none being in favour of James Kershaw, or his children). "And I give, devise and bequeath unto *my nephew James Kershaw, of Halgh, all my real estates, called" &c., "and all my real estates elsewhere situated in the counties of York and Lancaster, or either of them, with their appurtenances

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845]

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respectively, to hold to him, my said nephew James Kershaw, for his life, without impeachment of waste. And, from and after his decease, I give and devise all the same estates unto the first son of the body of my said nephew James Kershaw, to hold the same to such first son for and during the term of his natural life only, without impeachment of waste. And, from and after the decease of the last mentioned first son of the said James Kershaw, I give and devise all the said estates to the first son of the body of such last mentioned son, with remainder to the second, third and all other sons of the body of such last mentioned son, for ever, the elder being always preferred to the younger. And, in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs for ever. And I will, give and order that all my silver plate shall go and descend with my said real estates, according to the limitations aforesaid, and be considered as heir looms attending the same."

The verdict found that certain of the lands or real estates in the will comprise the messuage and tenement, with the appurtenances, in the writ mentioned.

That, at the time of making the said will, the said James Kershaw, of Halgh, in the said will mentioned, was a nephew of the said Jane Taylor, as therein mentioned; and had, at the time of making the said will, four children living, namely Mary, Jane, James and John, who were born in the said order; and that the said nephew had had another son named James, who was *baptised on or about 23rd February, 1800, and was the eldest son, but died an infant, of the age of about one year, several years before making the said will.

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That the said Jane Taylor died on 3rd April, 1807, without having revoked her said will.

That thereupon the said James Kershaw, the said nephew, entered upon the said messuage and tenement in the writ mentioned, and became seized of them for the estate so to him devised.

That the said James Kershaw, the said first mentioned son of the said nephew James Kershaw, survived the said testatrix; and, on 9th November, 1825, intermarried with the defendant Eliza Kershaw, by whom he had only five children, who were born in the following order; namely: two twins who were born on 14th October, 1828, and who died in a few days: one of them was a boy, and the other a girl; and neither of them was baptised: a

girl, who was born on 11th April, 1830, and who died in a few weeks; but she was baptised and named Sarah: a girl who was born on 6th January, 1835, who is now living, and named Elizabeth: a boy who was born on 12th February, 1846, who lived till he was between five and six years of age, who was named James Henry, and who died on 2nd June, 1845.

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That the said James Kershaw, the said nephew, died on the 12th February, 1835. That thereupon the said James Kershaw, the said son of the said nephew, who survived the said testatrix, entered upon the said messuage or tenement in the writ mentioned, and became seized thereof for the estate so to him devised. That on 6th August, 1851, the said James Kershaw, the said son of the said nephew, who survived the said testatrix, duly made and executed a certain deed under and in *pursuance of the Act made &c. (3 & 4 Will. IV. c. 74, "For the abolition of fines and recoveries, and for the substitution of more simple modes of assurance"); and which said deed was duly enrolled in the High Court of Chancery within six calendar months after the execution thereof. Whereby he, the said James Kershaw, attempted to convey and dispose of the said messuage and tenement in the writ mentioned to such uses, upon and for such trusts and purposes, and in such manner and form, as he, the same James Kershaw, should by any deed or deeds appoint; and, in default of such appointment and so far as the same should not extend, to the use of himself, the same James Kershaw, his heirs and assigns. And that, if he the same James Kershaw was seized of an estate tail in the said messuage or tenement, the same would be conveyed and disposed of according to the tenor and effect of the said deed.

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That on 21st May, 1852, the said James Kershaw, the said son of the said nephew, who survived the said testatrix, duly made and published his last will and testament in writing, duly attested and subscribed according to law. Which will contains, amongst other things, the following clause, namely: "I also give and devise unto my said wife Eliza Kershaw the estate belonging to me situate at" &c.; of which property the said messuage and tenement in the said writ described formed a part.

That the said Eliza Kershaw, in the said last mentioned will named, is the defendant in the writ mentioned.

That the said James Kershaw, the said son of the said nephew, who survived the said testatrix, died on 4th July, 1853, without having revoked or altered his said will.

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That the plaintiff is the great-nephew and heir-at-law of the said Jane Taylor, being the son and heir-at-law of Ottiwell Kershaw, who was the heir of the said Jane Taylor.

The verdict then left to the Court, in the usual form, the question whether the plaintiff was entitled to the possession of the premises as in the writ mentioned.

The case was now argued (1).

Joseph Addison, for the plaintiff :

James, the son of the nephew of the testatrix, had only a life estate, and could therefore give no estate extending beyond his own life. As he was alive at the time of the making of the will and after the death of the testatrix, a devise giving estates to his unborn son or sons as purchasers would not be bad for remoteness, he having an estate for life only. It will be argued, on the other side, that the language of the limitations over shows an intention to give him an estate of inheritance. But that view cannot be supported. First, the land is given to the nephew "for his life, without impeachment of waste." There is no pretence for treating this as a larger estate than for life. Then the land is given, "from and after his decease," to the first son of his body, "for and during the term of his natural life only, without impeachment of waste." The words here are as before, but strengthened by the addition of the word "only." This, so far, creates only an estate for life ; and the question is whether such estate is enlarged into an inheritance by the devise, from and after his decease, "to the first son of the body of such last mentioned son, with remainder *to the second, third and all other sons of the body of such last mentioned son, for ever, the elder being always preferred to the younger. And, in default of all such issue," to the right heirs of the testatrix "for ever." The estates of the sons of the nephew's son are all to be taken by purchase, whatever their nature is. The case is much like *Foster v. Lord Romney* (2). * * Lord ELLENBOROUGH there pointed out that, according to the view of Lord MANSFIELD in *Denne d. Briddon v. Page* (3), the word "such" confined the meaning of issue to sons, so that the limitation was not like one made "for default of issue," which would have given an estate tail.

(COLERIDGE, J. : Was *Evans d. Brooke v. Astley* (4) referred to in that argument ?)

(1) Before Lord Campbell, Ch. J., Coleridge, Erle and Crompton, JJ.

(2) 11 East, 594.

(3) 1 R. R. 655, n. (11 East, 603, n. ; 1 Bos. & P. 261, n.).

(4) 3 Burr. 1570.

It was referred to in *Denne d. Briddon v. Page* (1). *Slater v. Dangerfield* (2) is also an authority for holding that the son of the nephew took only an estate for life. *Monypenny v. Dering* (3) may be cited for the same point; although it may be admitted that the discussion in that case was mainly on the *cy pres* *doctrine.

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(*Cowling*, for the defendant, agreed to this.)

But, on the other side, it will be contended, further, that, even supposing this to be so, and his deed to be ineffective, still the plaintiff cannot recover, because the limitations following the gift of such estate for life give fees to the sons of the son of the nephew. Now, if they give only estates for life or in tail, the plaintiff must succeed, the sons having died without issue, and not having dis-entailed. But, to show a fee simple, the plaintiff will rely on the words "for ever." Whatever be the effect of these words, no more than an estate tail can arise. For, if the words gave a fee, that fee would go, in the first instance, to the eldest son of the nephew's son; and thus the intention of the testatrix, that the sons of the nephew's son should have estates successively in remainder one after the other, would be defeated; such eldest son might devise the whole away; if he did not, his daughters would take before his brothers. But, supposing the words "for ever," alone, would give the fee, then such estate is cut down to an estate tail by the words "in default of all such issue:" *Lewis d. Ormond v. Waters* (4).

(COLERIDGE, J.: Are you not now, for the purpose of cutting down the estate given to the sons of the nephew's son, seeking to give an effect to the words which you will not allow to them for the purpose of enlarging the estate of the nephew's son?)

"Issue" means the issue of the nephew's son, not the issue of the nephew's son's sons: the argument therefore may consistently be applied to one case and not to the other. Where an estate is expressly limited for life only, it never is enlarged into an estate tail except where that is *the only possible mode of giving effect to the limitations in remainder. But words which, of themselves, give inheritances may be restricted to estates tail by words which, as here, give the land over to heirs general upon the failure of the

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(1) 1 R. R. 655, n. (11 East, 603, n.; affirming 7 Hare, 568. See *S. C.* 73 Bos. & P. 261, n.). R. R. 547 (16 M. & W. 418).

(2) 71 R. R. 659 (15 M. & W. 263).

(4) 6 East, 336.

(3) 95 B. R. 52 (2 D. M. & G. 145).

KERSHAW donees, described as sons of the body, and taking successively in
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(COLERIDGE, J.: In *Lewis d. Ormond v. Waters* (1) the words “for want of such issue” followed the limitation “to the first and other sons of my said eldest son and their heirs.”)

Upon the assumption which the defendant must make here, the words “for ever” are tantamount to words of inheritance: if they are not, the estates are only for life, and the difficulty which is suggested against the plaintiff’s claim does not arise. The object of the testatrix was to defer to as late a time as possible the power of absolutely aliening the land: this general intention is carried out by the construction for which the plaintiff contends, without violating the intention apparent from any particular limitation.

Cowling, contra :

The nephew’s son took an estate in tail male: and a remainder over is limited in the event of the failure of such estate. The words “for ever” and “in default of all such issue” show that the testatrix meant to give some inheritable estate to some one. The question therefore is, Who is the root of this inheritable estate? If the son of the nephew be taken as the root, the intention of the testatrix will be carried out as nearly as can be done consistently with her language. It is to be observed that the disposition made of the land after the death of the nephew is very different from that made after the death of his son. After the death of the nephew, no interest is given to any son *of the nephew except James, the elder: his second son, John, is completely excluded, as well as his daughters. Had James, the nephew’s eldest son, not taken, the land would have gone to the right heirs of the testatrix. But, at the death of the son of the nephew, the land goes to his sons in succession, according to priority of birth, for ever. Here “sons” seems to be used as *nomen collectivum*: and, when the sons are exhausted, the land is to go, not to the daughters, but to the right heirs of the testatrix. That is, in effect, a tail male in the nephew’s eldest son.

(LORD CAMPBELL, Ch. J.: Would not the intention of the testatrix be fully carried out by making the son of the nephew’s son the root of the inheritable estate?)

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No construction will quite carry out the intention. The word "only," following the limitation for life to the nephew's son, will not affect the estate resulting legally from the limitations, any more than if the testatrix had given a fee with a proviso against alienation, in which case the proviso would have been rejected. It does, however, show that the testatrix believed that, but for the word "only," the limitations would have given more than a life estate. * * Here the failure of issue looked to is the failure of the issue of the son of the nephew; that son therefore is the root of the entail. If his sons take by purchase, what estate do they take? There is nothing to make it an estate in tail male, rather than in tail general: yet it is manifest that the testatrix meant to give the inheritance to males only. In *Wight v. Leigh* (1) the devise was to the plaintiff, and after his death to his first and other sons, and in default of male issue to his eldest and other daughters and their heirs male for ever: this was held to be a tail male in the plaintiff. * * The will here appears to use a peculiar vocabulary. If a testator devised to A. for life, remainder to A.'s son for life, remainder to such son's son for life, and so on for ever, that would be a tail male as much as if the words "tail male" had been used; and, if to that had been added a clause that no one tenant in possession should bar the estate, such clause would have been rejected.

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(CROMPTON, J.: The object here was, it seems, to prevent the barring as long as possible.)

Neither construction aids that. If the unborn sons of the nephew's son were to take by purchase, it would be a contingent remainder, which the tenant for life might defeat.

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(LORD CAMPBELL, Ch. J.: It is not likely that the testatrix knew that.)

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Joseph Addison, in reply. * * *

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a later day in this Term (June 8th), delivered the opinion of the COURT:

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In this case we are of opinion that the plaintiff is entitled to recover.

(1) 10 R. R. 120 (15 Ves. 564). See *Doe d. Burrin v. Charlton*, 56 R. R. 424 (1 Man. & G. 429).

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The only question is, What estate was taken, under the will of Jane Taylor, by James Kershaw, the son of James Kershaw the nephew of the testatrix? We think that he took only an estate for life. Such an estate is expressly limited to him by the words following the devise for life to the nephew, "and, from and after his decease, I give and devise all the same estates unto the first son of the body of my said nephew James Kershaw, to hold the same to such first son for and during the *term of his natural life only, without impeachment of waste." Still this estate for life might be enlarged into an estate tail, if there were any general intent expressed by the testatrix which, without doing so, could not be carried into effect. Her intent appears to have been that the sons of James the son should successively take estates tail, and that her right heirs should take only when these estates tail were exhausted. But this purpose will be carried into effect, James the son taking only an estate for life, and his eldest son taking an estate tail by purchase. Without the estate of James the son being enlarged so as to make him the *stirps* from whom his sons were to take by descent, the words which follow the limitation to him we consider quite sufficient to accomplish the intention of the testatrix: "and, from and after the decease of the last mentioned first son of the said James Kershaw, I give and devise all the said estates to the first son of the body of such last mentioned son, with remainder to the second, third and all other sons of the body of such last mentioned son, for ever, the elder being always preferred to the younger. And, in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs for ever." Bearing in mind that James the son of the nephew was born when the will was made, not only does the intent of the testatrix seem manifest, but she uses apt language to carry it into effect, after giving James the son an estate for his natural life only. Without express words of inheritance in the limitation to his sons, it seems clear that, taking by purchase, they would take more than life estates, viz. estates tail successively. The several expressions, "with remainder," "for ever," and "in default of all such issue

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*as aforesaid," we think are abundantly sufficient to indicate an intention to that effect. If the ultimate limitation in fee had been to a stranger, instead of being to the right heirs of the testatrix, it would have taken effect upon the death of James the son without issue, or upon the failure of the estates tail given to his sons: but this is quite compatible with James the son taking an estate for life only.

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Mr. Cowling contended that this construction of the will would defeat the intention of the testatrix by taking in females, as, if the sons of James the son take estates tail by purchase, they must be estates in tail general, whereas, he says, she manifests a desire to exclude females from the succession. If such an intention be so clear, the estates tail taken by the sons may be construed to be estates in tail male. But we cannot discover any such manifest intention; nor do we see how it would be better carried into effect by giving an estate tail to James the son. This would be in direct violation of the language she has employed, and would entirely defeat the intention she manifests, by her will, to keep the lands devised inalienable as long as she could in the line of the Kershaws by exercising the power which she had to give an estate for life only to the son of her nephew. His disentailing deed and his will therefore operated nothing: and the plaintiff is entitled to recover as the heir-at-law of the testatrix.

We do not consider it necessary to comment upon the cases cited in the argument; for none of them conflict with our decision; and they only lay down the well known general rules by which we have been guided in giving judgment for the plaintiff.

Judgment for the plaintiff.

REG. v. DAY.

(3 EL. & BL. 859—867; S. O. 2 C. L. R. 1685; 23 L. J. Q. B. 317; 1 Jur. N. S. 107; 2 W. R. 515; 23 L. T. O. S. 156.)

1854.
June 3.

By a local statute, land was vested in trustees in fee, in trust for the benefit of the inhabitants of the parish of H., subject to bye-laws which the trustees were empowered to make. The trustees were empowered to let the land; and to regulate the right of pasture, on the portion not let, to be enjoyed by the inhabitants of the parish of H., householders at the time of the passing of the Act. The right of pasture of each such householder at the time of the Act was assignable to any others being inhabitants.

At an election for coroner for a district comprehending the parish of H. and the land in question, the votes of inhabitants of the parish entitled, as assignees, to pasture over the land in question were received for the candidate who was returned.

On a *quo warranto* against him:

Held, that the qualification for a voter for coroner is the possession of a legal freehold: that these inhabitants had, at most, only an equitable interest in the land; and that their legal interest was, at most, a right to common in gross, which confers no vote. Judgment for the Crown.

[Coroners are not now elected by the freeholders, but by the county councils (see 51 & 52 Vict. c. 41, s. 5). It is therefore considered sufficient to preserve the head-note to this case.]

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1854.
June 6, 13.

3 El. & Bl. 868—889; S. C. 2 C. L. R. 1710; 23 L. J. Q. B. 362; 18 Jur. 748;
2 W. R. 524; 23 L. T. O. S. 187.)

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By a policy executed in London, on 7th April, 1851, premises in California were insured against fire for a year from 1st February, 1851. The premises were described in the policy as "a brick building used as a dwelling-house and store (described in the paper attached to this policy)." The paper attached gave a minute description of a two storied house, with what purported to be a certificate that the description was accurate, signed on 30th October, 1850. The description was, in fact, accurate up to March, 1851; in which month the assured altered the house by adding a third story. This was unknown in London when the policy was signed. In May, 1851, the house, thus altered, was destroyed by fire. In an action on the policy, on a case stating the above facts:

Held, that the description in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from that description, so as to increase the liability of the assurer: that this warranty was broken; and, consequently, that the plaintiffs could not recover.

ASSUMPSIT against an underwriter for 1,600*l.*, on a policy of insurance against loss by fire, for a year, from 1st February, 1851, to 1st February, 1852, on "a brick building, used as a dwelling house and store, described in a paper attached to that policy," situate at San Francisco, valued at 4,000*l.*, payable within thirty days after proof of loss. Averment of a total loss by fire, and that thirty days had elapsed after proof thereof. Breach: Non-payment.

Pleas. 1. *Non assumpsit*. Issue thereon. 2. Denial of the loss: conclusion to the country. Issue thereon. 3. Denial of the lapse of thirty days: conclusion to the country. Issue thereon. 4. That, after the making of the policy, and before the loss, plaintiffs, without the knowledge or consent of defendant, materially altered the premises, so as thereby to vary and increase the risk: verification. 5. That, by the paper attached to the policy, plaintiffs warranted that the building was &c. (the plea then set out the description): that defendant *subscribed the policy, confiding in that warranty: that the building did not answer that description, either at the time of the making the policy, or at the commencement of the risk on 1st February, 1851: verification. 6. That the policy was obtained by misrepresentations, and concealments of facts known to plaintiffs, material to the risk and the amount of premium: verification.

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(1) Questioned, *Thompson v. Hopper* (1860) El. Bl. & El. 1033, 1049, 27 L. J. Q. B. 441.

Replications to 4th, 5th and 6th pleas: *De injuria*. Issues thereon.

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On the trial, before Lord Campbell, Ch. J., at the London sittings after last Trinity Term, the verdict passed for the plaintiffs, subject to the following case.

The plaintiffs are the agents of Messrs. Godeffroy, Sillem & Co., who are merchants, at San Francisco in California. The defendant is an underwriter in the city of London. Messrs. Godeffroy, Sillem & Co. were, from the month of October, 1850, to the time of the fire hereinafter mentioned, the owners of a brick building, used as a dwelling-house and store, situate at the corner of Clay and Leidesdorff Streets at San Francisco in California, built in September, 1850. In the month of October, 1850, being desirous to effect an insurance against fire upon the building, they transmitted to their agents a description of the building, as it then stood, being the description hereinafter mentioned as annexed to the policy of insurance effected with the defendant. The cost of the original building, so described, was 6,000*l.*; it was valued in the policy at 4,000*l.* In March, 1851, Messrs. Godeffroy, Sillem & Co. were desirous to erect a third story to the building. They commenced doing so on the 26th of March, 1851; and between that date and the time of the fire hereinafter mentioned, the following alterations and additions were made. The *walls of the original building were carried up to make a third story, and the roof put upon that story, the new walls being carried up in all to the height of 13 feet, of which 3 feet were above the new roof. The new walls were 12½ inches thick; the new roof was not covered with zinc or other metal; it was composed of a layer of brick, a layer of cement, and then another layer of cement. The original building remained, the roof being flat and not having been interfered with; but the reservoir was, on the 2nd of May, 1851, taken from the top of the old roof, and placed upon the top of the new roof, that being necessary in order to allow of the completion of the improvements in the interior of the additional story: such removal was intended to be permanent, and to be made to communicate with the requisite pipes. When the reservoir was so removed, four hogsheads of water, communicating with the water pipe so that they could be refilled as often as necessary, and containing 240 gallons, were placed on the old roof which had then become the floor of the additional story. In addition to this, the old roof could be flooded with water by means of a pipe connected with the pump. The

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reservoir, from the time when placed on the new roof, up to and at the time of the fire, had a foot of water in it. There was no feed pipe attached to it, and no communication with the force pump, or other means of filling it with water adapted to it. There was no pipe on the new roof with holes in it, or other means capable of maintaining a constant or any stream of water over such roof. Nor were there any means of supplying water to such roof, except by buckets. There were four openings for windows in the new story: shutters of iron had been ordered for them, but had not been sent home; and they *had no shutters of any sort up to or at the time of the fire. During the fire, these holes were stopped up with wet blankets. These works cost 1,000*l*. They are to be taken as not having increased the hazard or probability of fire, except so far (if at all) as the increase of the area of a building by a third story may be considered by the Court to have necessarily increased such hazard or probability. On the 7th April, 1851, the plaintiffs, as agents for the said Messrs. Godeffroy, Sillem & Co., effected with the defendant a policy of insurance for 1,600*l*., as follows. "In the name of God Amen. Whereas Messrs. Herman, Sillem, Son & Co., merchants, London, have paid six guineas per cent. premium or consideration to us who have hereunto subscribed our names, to insure from loss or damage by fire a brick building used as a dwelling-house and store (described in the paper attached to this policy), situated at the corner of Clay and Leidesdorff Streets at San Francisco in California, and belonging to Messrs. Godeffroy, Sillem & Co. of San Francisco, valued at 4,000*l*. sterling, from noon on the 1st day of February, 1851, to the 1st day of February, 1852, at noon: Now know ye that we, the insurers, do hereby bind ourselves, each for his own part, and not one for another, our heirs, executors and administrators, to pay to the said Herman, Sillem, Son & Co., executors, administrators and assigns, all such damage and loss by fire not exceeding the sum of within thirty days after such loss is proved, and that in proportion to the several sums by each of us subscribed against our respective names, without any deduction whatsoever, or any allowance for average or charge on what may be saved, unless the said Herman, Sillem, Son & Co. shall make any further insurance in any of the public offices or elsewhere, during the *continuance of this policy; in which case the insured is to make a declaration of the same by indorsing such sum he so insures, in the public offices or elsewhere, on the back of this policy; and we the insurers will then be

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contented to pay our equal average on the loss sustained, with the said public offices or elsewhere. In witness whereof we have subscribed our names and sums of money by us insured. Dated in London, the 7th day of April, 1851, 1,600*l.*: RICHD. THORNTON, p. W. T. West, sixteen hundred p*ds.*” The paper mentioned in the policy as annexed thereto was as follows. “Description of brick store on the corner of Clay and Leidesdorff Streets. Frontage on Clay Street 30 feet, on Leidesdorff Street 59½ feet, more or less. The house is composed of two stories without a basement story. The ground floor is 12 feet, the upper one 10 feet, in height: the walls from the foundation to the upper story of 16 inches thickness: the ground floor is paved with marble slabs: the roof is composed of a layer of cement on wood and covered with zinc: the walls around the same are raised 3 feet on two sides, and on the south side about 9 feet, there being at present a wooden building adjoining. On the roof is a reservoir containing about 600 gallons of water: this is supplied from an artesian well on the ground floor, 100 feet deep, in connection with which is a powerful force pump, by which the first floor is also constantly supplied with water; the roof is also so constructed that, by means of a pipe, extending the whole length of the same, and supplied at certain intervals with holes, a constant stream of water can be maintained over the entire roof by working the pump on the lower story. The window and door frames are attached towards the interior of the building: all windows and doors are supplied with thick iron shutters *on the exterior, so that, between the shutters and window or door, is in all places a space corresponding with the thickness of the walls; in this manner no wood work whatever is exposed externally. The house has been built with the express design of rendering it fire proof; and no precaution has been neglected to render it so. The tide rises to the opposite side of Leidesdorff Street, which is still unoccupied; and in the house itself is an almost unlimited supply of water from the artesian well already mentioned. The walls on the south and west sides are dead walls: these are constructed with a vacuum in the centre, so as to repel the influence of heat. GODEFFROY, SILLEM & Co. We the undersigned do herewith certify that, by request of Messrs. Godeffroy, Sillem & Co., we repaired to their brick building at the corner of Clay and Leidesdorff Streets, and, after a true and faithful examination, found the above description of the same a perfectly correct one. And we further willingly declare that, so far as we can judge, nothing has been omitted in

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rendering the house fire proof. 31st October, 1850. Given under our hands this 30th day of October, 1850. B. DAVIDSON. J. DE PUISAGE GREEN, Lloyd's Agent, in the absence of H. W. Henrickson. HERON REINCKE, Agent for the Hambro' Board of Underwriters." On the night of the 3rd of May, 1851, a fire took place at San Francisco by which a great part of the city, and, amongst others, the premises insured, were burnt to the ground: and the plaintiffs suffered a total loss, with the exception of a salvage amounting to 400*l*.

The Court to have the same power to draw inferences of fact as a jury, and may allow interest, under stat. 3 & 4 Will. IV. c. 42 (1), from the 3rd May, 1851.

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The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover in the action; or whether that right is defeated by the alterations and additions aforesaid, which were made in the building. If the Court should decide that the plaintiffs are entitled to recover, the verdict is to be entered for the plaintiffs for 1,600*l*., less a proportional deduction for the salvage if the Court may consider the defendant entitled to it, and also interest if adjudged by the Court. If otherwise, then a verdict to be entered for the defendant, upon such issue or issues as the Court may direct.

The case was now argued (2).

Bramwell, for the plaintiffs :

The house insured having been destroyed by fire, it lies on the underwriter to show why he does not pay the insurance money. An alteration, if such as to change the nature of the subject-matter of the insurance, no doubt discharges the underwriters. But, so long as the thing insured remains the same, an alteration will not avoid the policy, unless it be either fraudulent, which is not in this case pretended, or a breach of some condition, imposed by contract either express or implied. In the present case the dates are material. On 30th October, 1850, the description, contained in the paper attached to the policy, was signed in California. It was at that time accurate. On 26th March, 1851, the alterations commenced: it does not appear how far these had gone when the

(1) Sects. 28, 29.

(2) Before Lord Campbell, Ch. J., Coleridge and Erle, JJ. Crompton, J., also heard the beginning of the

argument, but went to chambers before its conclusion, and took no further part in it.

policy was signed ; but they were completed before the fire, in May, 1851. The policy was signed in this country on 7th April, 1851, after the alterations had commenced in *California, but before it could possibly be known, in this country, that they had commenced ; and the risk commenced on 1st February, 1851. So that the description was accurate when given, was accurate when the risk commenced, was believed, in this country, to be accurate at the time when the policy was signed, though it may then have become inaccurate, and was certainly inaccurate at the time of the fire. Now, if this description is a representation merely, the alterations, being found not to have increased the risk of fire, are immaterial.

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(LORD CAMPBELL, Ch. J. : It may not increase the chance of a fire happening ; but it must increase the liability of the insurer, in case of a partial loss, if the subject-matter of a fire policy is made more extensive. Do you contend that, in case of a partial loss, the underwriter would not be answerable for the damage done in the addition to the building ?)

No. But, though the risk may in that sense be greater, nothing can discharge the underwriter but either fraud in the conception of the policy, or a breach of some condition, express or tacit. If the reference in the policy to the description, contained in the paper attached to it, is to be construed as a promissory warranty that the description shall continue accurate, throughout the risk, so that the plaintiffs have by their bargain bound themselves, under pain of forfeiting their policy, to make no alteration whatever in their premises, the plaintiffs have broken an express condition. But there is no such improvident bargain. The description is, at most, a warranty that the buildings did answer that description when it was made, not a promise that they should continue to do so. Neither is there any tacit and implied condition in a fire policy that the buildings shall not be altered. In general, in *fire policies there are special conditions indorsed on the back of the policy, by which the insured undertakes not to suffer a dangerous trade to be carried on on the premises, and various other stipulations against things increasing the risk. [He then referred to *Shaw v. Robberds* (1) and *Pim v. Reid* (2) and concluded :] It could never be understood by the parties that, when insuring against fire in California from

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(1) 45 R. R. 407 (6 Ad. & El. 75).

(2) 64 R. R. 716 (6 Man. & G. 1).

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an antecedent day, the insurers absolutely warranted that the premises still remained in the state they were in when last heard of, a thing which they could not know.

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James P. Wilde, contra :

The fourth issue should be found in favour of the defendant ; for the alterations are material. The increase of a house, by adding a third story, may vary the probability of a fire occurring, and must, at all events, increase the liability, if a fire does occur. * * And the fifth and sixth issues, also, should be found for the defendant. The plaintiffs might if they pleased, have sent to their agents a statement that they proposed to make some alterations, and have let that be communicated to the underwriter in order that he might judge whether he would demand a higher premium. Instead of doing so, they send off a description ; and then, before it is acted on, intentionally alter the house, so that, as they know, their agents in England will, *bonâ fide* on the part of the agents, make a representation no longer true. In *Cornfoot v. Fowke* (1) all the Court agreed that, if the principal had intended his agent to make the false representation, it would have avoided the contract in that case ; and, of course, *à fortiori* it will avoid a policy, an instrument in which a misrepresentation, though made by inadvertence, avoids the contract ; note (1) to *Goram v. Sweeting* (2). Here the representation was true when made in California ; but, before it was made to the defendant in this country, it was, by the plaintiffs' voluntary act, made untrue. But it is *scarcely denied that the description in the policy is a warranty, though it is said to be not a promissory warranty, but merely an affirmative one. * * The warranty is not that every minute particular in the description shall be accurate whether material to the risk or not : * * it would be no matter if the wrong number in the street were given ; but the warranty is confined to the parts of the description substantially affecting the risk. [He then referred to *Shaw v. Robberds* (3), *Dobson v. Sotheby* (4), *Mayall v. Mitford* (5), and *Pim v. Reid* (6).]

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Bramwell, in reply. * * *

Cur. adv. vult.

(1) 55 R. R. 655 (6 M. & W. 358).
(2) 2 Wms. Saund. 200 b.
(3) 45 R. R. 407 (6 Ad. & El. 75).

(4) 31 R. R. 718 (Moo. & Mal. 90).
(5) 45 R. R. 588 (6 Ad. & El. 670).
(6) 64 R. R. 716 (6 Man. & G. 1).

LORD CAMPBELL, Ch. J., on a subsequent day in this Term (June 13th), delivered judgment :

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We are of opinion that, in this case, the assured are not entitled to recover, as they have broken a warranty, on the faith of which the defendant must be considered as having signed the policy. The engagement is, "to *insure from loss or damage by fire a brick building, used as a dwelling-house and store (described in the paper attached to this policy), situated" &c., "belonging to Messrs. Godeffroy, Sillem & Co.," "valued at 4,000*l.* sterling from noon on the 1st day of February, 1851, to the 1st day of February, 1852, at noon." The description, in the attached paper, must be supposed to be introduced into the body of the policy between the brackets, instead of the reference to it. *Verba relata inesse videntur*. The following is the commencement of this description: "Frontage on Clay Street 30 feet, on Leidesdorff Street 59½ feet, more or less. The house is composed of two stories without a basement story." Then comes a statement, among other things, that the ground floor was covered with marble slabs; that the roof was composed of cement, and covered with zinc; that on the roof was a reservoir, containing about 600 gallons of water, which was supplied from an artesian well; that a constant stream of water could be maintained over the entire roof, by working the pump on the lower story; that all the windows and doors were supplied with thick iron shutters, so that no wood work was exposed externally; and that there was an almost unlimited supply of water from the artesian well. The special case finds that this house was built, in September, 1850, at a cost of 6,000*l.*; and that Messrs. Godeffroy, Sillem & Co., in the month of October following, being desirous of effecting an insurance upon it, transmitted to their agents in London the description of it attached to the policy. This was a correct description of it, in all respects, as it then stood; and, on the faith of this description, the defendant signed the policy, dated 7th April, 1851. But, in March, 1851, Messrs. Godeffroy, *Sillem & Co. were desirous of adding a third story to the building. They commenced doing so on the 26th of that month, and had completed it before the 3rd of May, when the premises were consumed by a conflagration which laid in ashes almost the whole of San Francisco. The new story cost 1,000*l.* There were various alterations in the roof and other parts of the buildings: but it was agreed in the case that the new works "are to be taken as not having increased the hazard or probability of fire, except so far (if at all) as the

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increase of the area of a building by a third story may be considered by the Court to have necessarily increased such hazard or probability." We are now to consider the effect of the description of the premises insured, which has been introduced into the policy. And, in the first place, we are of opinion that it amounts to a warranty that the premises corresponded with it on the 7th April, 1851, when the policy was effected, or, at least, that the premises had not been altered by the assured in the intermediate time, so as to increase the risk of the insurer. *Mr. Bramwell* contended that it referred only to 31st October, 1850, the date of the certificate of the surveyors, in California, who verified its accuracy; and that, if accurate at that time, the policy would not be vitiated by any alteration between that day and the date of the policy, so that, notwithstanding the alteration, the identity of the house was not destroyed. But we think that this position is wholly at variance with the effect which has hitherto been given to the description of the subject-matter insured in policies of insurance, and would utterly defeat the object for which such a description is required. It would seem revolting to common sense, if we were to hold that,

[*882] as soon as Messrs. *Godeffroy, Sillem & Co. had sent off the description, to be shown to an insurance office or private underwriter, they might have added several stories to the house, and removed from it all the described safe-guards against fire, and that, although the description misdescribed the actual state of the premises at the date of the policy, a fire afterwards happening, an indemnity might be claimed, for which the underwriter had received no adequate consideration. But this is the principle contended for by the assured. Not being told the exact progress which had been made in the alterations between the 26th of March and the 7th of April, we are to draw inferences from the facts stated; and we infer that, on the 7th April, the building no longer corresponded with the description of it in the policy, and that, by the alteration, the risk of the insurer had in some degree been increased. This alone would be a bar to the present action.

But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do any thing to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether

he will agree to take the risk at all, and, if he does take it, what premium he shall demand. The assured no doubt wished him to understand that, not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to *be liable, if a loss should accrue. Without such an assurance and belief, the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis?

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With respect to marine policies, we conceive that, if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such a warranty is continuous, and, if it be broken by the default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage; but, even here, if the assured, during the voyage, were, voluntarily, to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy.

A distinction, however, is taken in this respect between marine policies and insurances of houses against fire. It would probably be allowed that, if during war there were a policy on a merchant ship described as carrying ten guns and employed in the coal trade, and, after the policy was effected, the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss. But it is strenuously asserted that, if there be an insurance against fire upon a house, *which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade, this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent

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loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of the insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange then, that, if a house be described in the policy as occupied by the owner carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards, merely taking care that the walls and floors and roof remain, so that it is still the same identical house, convert it into a manufactory for fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity. We are told, however, that this doctrine is established by decisions binding upon us. The first of these is *Shaw v. Robberds* (1). Plaintiff insured premises against fire by the description of "a *granary" and "a kiln for drying corn in use." By the conditions of insurance the policy was to be forfeited unless the buildings were accurately described, and the trades carried on therein specified; and, if any alteration were made in the building, or the risk of fire increased, the alteration was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln except drying corn; but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it gratuitously in the kiln; and this occasioned a fire by which the premises were destroyed. Drying bark was proved to be a distinct trade from drying corn, and more hazardous, insurance offices charging a higher premium for bark kilns than corn kilns. Held, that the plaintiff was entitled to recover. But what was the *ratio decidendi*? Lord DENMAN, Ch. J. (2): "If the plaintiff had either dropped his business of corn-drying, and taken up that of bark-drying, or added the latter to the former, no doubt the case would have been within" the condition relied upon. "Perhaps, if he had made any charge for drying this bark, it might have been a question for the jury whether he had done so as a matter of business, and whether he had not thereby (although it was the first instance of bark-

(1) 45 R. R. 407 (6 Ad. & El. 75).

(2) 45 R. R. 407 (6 Ad. & El. 82).

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drying) made an alteration in his business, within the meaning of that condition. But, according to the evidence, we are clearly of opinion that no such question arose for the consideration of the jury." The COURT there intimates an opinion that there was no implied warranty that nothing besides corn should ever be dried in the kiln, but gave no countenance to the *doctrine that another and more dangerous trade could be carried on in the kiln without vitiating the policy. The other case, which was more confidently relied upon, and, on account of some expressions of some of the Judges, not without reason, was *Pim v. Reid* (1). But, when examined, we do not think it is an authority for the doctrine which it is cited to support. The insurance, there, was upon a manufactory, engine house and machinery against fire; and the policy contained conditions resembling those in *Shaw v. Robberds* (2) (amongst others), that, if the assured should "omit to communicate" to the insurance office "any circumstance which is material to be made known to the Company, in order to enable them to judge of the risk, they had undertaken or were required to undertake, the insurance should be of no force." There were pleas on these conditions, alleging that the assured carried on a more dangerous trade than that specified in the policy, which was a circumstance material to be made known, and had omitted to communicate it to the office, the non-communication being made the infraction relied upon and the gist of the pleas. The issues on these pleas were found for the defendant; but there was a rule for judgment for the plaintiff *non obstante veredicto*, which was made absolute. The pleas were considered bad, for not showing that a reasonable time had elapsed for giving notice; and on this defect alone COLTMAN, J. rested his judgment. The other Judges do make use of some observations, as if, under this policy, the assured might change his trade to one more dangerous than that described at the time of making the policy; but these *observations appear to have reference to the necessity for giving notice for the particular purpose specified in the conditions on which the pleas were founded. TINDAL, Ch. J. says: "How can an alteration which takes place in the enjoyment of the premises after the execution of the policy be a circumstance material to be made known to the Company in order to enable them to judge of the risk they have undertaken?" And MAULE, J. observes: "The time at which the Company are to exercise their judgment is not the time at which the communication

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(1) 64 R. R. 716 (6 Man. & G. 1).

(2) 45 R. R. 407 (6 Ad. & El. 75).

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is to be made." Therefore this case cannot be considered an authority for the doctrine sought to be established; and, if it were, we could not concur in it; for the doctrine appears to us to be contrary to the principles of justice; and it is certainly contrary to the ruling of Lord TENTERDEN in *Dobson v. Sotheby* (1). There the insurance was on premises against fire, "wherein" (according to the statement in the policy) "no fire is kept, and no hazardous goods are deposited." The loss happened in consequence of the making a fire and bringing a tar barrel on the premises, for the purpose of repairing them. The plaintiff was held entitled to recover: but Lord TENTERDEN said that, if there had been any misdescription of the property insured, the defendants certainly were not liable, and added: "I think that the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises." "I cannot, therefore, be of opinion that the policy in this case was forfeited."

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Now, assuming the law to be that, upon an insurance against fire, there is an implied engagement that the assured will not afterwards alter the premises, so as that they shall not agree with the description of them in the policy, and so that thereby the risk and liability of the insurer shall be increased, we have only to consider whether, in this instance, the assured have not done so by converting the house insured from a house "composed of two stories" into a house composed of three stories. And this really admits of no reasonable doubt. *Mr. Bramwell*, very candidly, admitted that, if the policy remained in force after the alteration, it covered the third story as well as the other two. This being so, the increase of the area of the building by a third story must be considered by the Court to have necessarily increased the hazard or probability of fire, about as much as if the addition to the house had been lateral instead of vertical. But there is another consideration which is quite decisive to show that, by the alteration, the liability of the insurer is increased, and that his premium, if previously fair, has now become inadequate. Upon an insurance of a house against fire the insurer must make good the whole of any partial loss, the owner not being considered to stand his own insurer for the excess of the value of the house beyond the sum for which the insurance is effected. The value of the additional property, here sought to be

(1) 31 R. R. 718 (Moo. & Mal. 90).

covered by the insurance, must be taken to be 1,000*l.*; and for the whole of this, or any part of it, the defendant is now liable to the full amount of the sum for which he has subscribed the policy, till he has paid 1,600*l.*, *plus* his liability to this amount for the destruction of any part of the original house valued at 4,000*l.* We are of opinion *that this additional liability could not be thrown upon him, without any consideration and against his consent, by the act of the assured in altering the house so as to make it no longer correspond with the description of the house in the policy. If the liability cannot be carried to this extent, it is entirely gone. And, therefore, we pronounce judgment for the defendant.

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Judgment for the defendant.

REED v. INGHAM.

(3 El. & Bl. 889—902; S. C. 2 C. L. R. 1495; 23 L. J. M. C. 156; 1 Jur. N. S. 61.)

Sect. 37 of stat. 7 & 8 Geo. IV. c. lxxv. (1) (local and personal, public) imposes a penalty upon any person who, not being a freeman of the Waterman's Company, or an apprentice to a freeman or to the widow of a freeman, (with certain exceptions) shall "act as a waterman or lighterman, or ply, or work or navigate, or cause to be worked, or navigated, any wherry, lighter, or other craft," upon the Thames, "from or to any place or places, or ship or vessel," within the limits of the Act, for hire or gain:

Held, that a steam tug of eighty-seven tons burden, employed in moving another vessel, was not a "wherry, lighter, or other craft," under this section; and that a person navigating her for this purpose, not being a freeman &c., did not thereby incur a penalty.

[This case is practically obsolete, being superseded by the definitions in 56 & 57 Vict. c. lxxxi. s. 2. Merely the head-note is, therefore, preserved.]

1854.
June 5.

DOWDELL v. AUSTRALIAN ROYAL MAIL COMPANY (2).

(3 El. & Bl. 902—906; S. C. 2 C. L. R. 1656; 23 L. J. Q. B. 369; 18 Jur. 579; 2 W. R. 554; 23 L. T. O. S. 189.)

1854.
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[902]

Plaintiff obtained a verdict. Defendant obtained a rule *nisi* for a new trial, which was discharged. Plaintiff was a witness in his own cause; and he remained in this country till after the rule *nisi* was discharged. On taxation the Master allowed the plaintiff subsistence money from the time the rule was granted till it was discharged. On a rule to review the taxation:

Held, that, as the Master must be taken to have found that plaintiff was

(1) Repealed: 22 & 23 Vict. (2) Cited, *The Bahia* (1865) L. R. 1 A. & E. 15, 16
c. cxxxiii.

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a necessary witness, that he could not have attended a second trial, if one were ordered, unless he remained, and that his remaining incapacitated him from earning his subsistence, the detention might, under those special circumstances, be considered as part of the costs of the rule; and the allowance was right.

It is not a general rule that parties, if witnesses, are to have an allowance for their attendance.

LUSH, in this Term, obtained a rule *nisi* to review the Master's taxation in this cause. The plaintiff was a seafaring man, whose occupation was that of purser on board ship. He brought an action against the defendants, which was tried at the sittings in Middlesex after last Michaelmas Term, when the plaintiff obtained a verdict. In Hilary Term, the defendant obtained a rule *nisi* for a new trial, which was discharged in Easter Term. The plaintiff was examined as a witness on his own behalf at the trial; and it was sworn, in the affidavit of increase, that plaintiff had necessarily been detained in this country ever since the commencement of the action, for the purpose of giving evidence in the cause, and that his evidence was of such importance that the cause could not have been safely brought to trial in his absence. The Master made an allowance for the plaintiff's detention, from the time of the rule for the new trial being granted, till it was discharged.

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J. Gray now showed cause :

The plaintiff stayed in this country, not as plaintiff in the cause, but as a witness. His testimony would have been necessary if the rule had been made absolute; and therefore it was proper to detain him, and the costs of doing so should be allowed.

(LORD CAMPBELL, Ch. J. : If there had actually been a new trial that might be so. But do you find any authority for allowing the costs of a witness detained in reasonable expectation of a new trial, which did not take place?)

There seems no express decision either way. In *Mount v. Larkins*(1), where the Prothonotary had made the witness an allowance only up to the first trial, the Court of Common Pleas refused to order an increase in the allowance: but the reason given was that the Court had intimated that the new trial, if granted, would be confined to a point on which the evidence of the witness was not material.

(CROMPTON, J. : If a witness were brought and detained here in

(1) 34 R. R. 644 (8 Bing. 195).

bonâ fide and reasonable expectation of a trial, and there never was any trial at all, would his costs be allowed ?)

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They would be allowed: *Tremain v. Barrett* (1), *Loneragan v. The Royal Exchange Assurance* (2). In the latter case there was no trial, as appears by the report in Dowling, though not by that in Bingham. Then the *plaintiff is not differently situated, in this respect, from any other witness. The rule is laid down by this Court in *Howes v. Barber* (3): "The reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand, or to seek redress for an injury, should be thrown on the wrong doer." Then, the question whether the detention of the plaintiff was necessary, and the expenses reasonable, is for the Master.

[*904]

Lush, in support of his rule:

Howes v. Barber (3) laid down the rule that the costs of the party, when a witness, were to be paid like those of any other witness. But there is no case in which the expenses of the detention of any witness waiting for a new trial have been allowed, though there must have been very many cases in which they have been incurred. The law does not profess to give an entire indemnity by giving costs. There are many expenses proper to be incurred which are not allowed. In *Loneragan v. The Royal Exchange Assurance* (2) the defendant seems to have submitted and paid only at the last moment, so that the costs in question were incurred by his fault. And the plaintiff is not quite like any other witness; he has full control over himself.

(CROMPTON, J.: That is a reason why the case should be more closely watched; but the only distinction between the case of a plaintiff being a witness in his own behalf and an ordinary witness is that the Master should be more vigilant in exercising his discretion.)

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a subsequent day in this Term (June 15th), delivered judgment:

[905]

After much hesitation, and great doubt, we have in this case come to the conclusion that the rule to review the taxation must be discharged. But we are anxious that it should be understood that

(1) 16 R. R. 584 (6 Taunt. 88). 223, 233.

(2) 7 Bing. 725; *S. C.* 1 Dowl. P. C. (3) Q. B. Trinity Term, 1852.

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we lay down no general rule, that, after a rule *nisi* for a new trial has been obtained, the witnesses may be detained at the cost of the losing party. The circumstances in the present case are peculiar. The plaintiff was a witness in his own cause; and his evidence at the trial was material: his regular employment was one which required him to be absent from this country: after he had obtained a verdict, a rule *nisi* was granted for a new trial, which was ultimately discharged. The Master, on taxation, made the plaintiff an allowance from the time the rule was granted till it was discharged, but only on the ground that the plaintiff was a necessary witness in his own cause; that he could not possibly be ready to give evidence on the second trial, if one had been ordered, unless he remained in this country; and that his remaining here deprived him of his ordinary means of earning subsistence by going abroad, and that he could not earn anything here. Under these circumstances, we think that this was an expense occasioned by the defendants' resistance, and that it may properly be considered part of the costs of the rule for a new trial. We do this, taking it to be found, as facts, by the Master that the evidence of the plaintiff would be material, that in order to give it the detention was necessary, and that the detention deprived the plaintiff of the means of subsistence: except under such circumstances the allowance ought not to be made. We must guard carefully *against an abuse by which parties in a cause may, as witnesses, obtain an allowance which they are not entitled to as parties. Under such peculiar circumstances as the present the allowance was right: but we most earnestly desire that it may not be considered a general rule that parties, if witnesses, are to have an allowance for their attendance.

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Rule discharged.

1854.
June 8.
[906]

SHARPLEY v. OVERSEERS OF MABLETHORPE (1).

(3 El. & Bl. 906—918; S. C. 24 L. J. M. C. 35; S. C. nom. *R. v. Overseers of Mablethorpe*, 2 W. R. 533; 18 Jur. 835; 23 L. T. O. S. 172.)

Appeal against a poor rate for the parish of M., on the ground that the alleged parish of M. in truth consisted of two distinct parishes, M. St. Mary and M. St. Peter, each of which ought to be rated separately. A case was stated with power to the Court to draw inferences of fact. By this it appeared that from very early times there were *de facto* two rectories, one of M. St. Mary and the other of M. St. Peter, distinct parishes for ecclesiastical purposes; but that, as far back as evidence went, which was not beyond the beginning of the eighteenth century, there had always been one

(1) Cited, *Reg. v. Watson* (1868) L. R. 3 Q. B. 762, 768, 37 L. J. M. C. 153.

poor rate, one set of overseers, and one constable for the whole of M. as one parish for civil purposes, and the highways in M. had been jointly maintained by the whole of M.

In the taxation of Pope Nicholas, the churches of M. St. Peter and M. St. Mary are valued separately. In the Nonarum Inquisitiones, it is mentioned as one parish, in which are two churches taxed conjointly. Other early records were set out which were ambiguous:

Held, that the proof of modern usage showed that M. was a reputed parish at the time of the passing of the Poor Relief Act, 1601 (43 Eliz. c. 2); and, that being so, even if it was really not then a parish, the rate could not now be disturbed.

Semble, that the evidence tended to show that M. had been from time immemorial one parish, with two churches.

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NOTICE of appeal having been given against a poor rate for the relief of the poor of the parish of Mablethorpe, Lincolnshire, by a person rated, the following case was, by consent and by order of a Judge, stated for the opinion of this Court.

The appellant's ground of appeal against the rate is, that the alleged parish of Mablethorpe, in truth, contains within itself, and consists of, two separate parishes, *namely the parish of Mablethorpe St. Mary and the parish of Mablethorpe St. Peter; each of which ought to maintain its poor separately, and to appoint separate overseers of the poor, and levy separate rates for their relief. The respondents contend that, long before and at the time of passing of stat. 43 Eliz. c. 2, Mablethorpe was either actually, or by reputation, a parish, and was therefore entitled to have overseers appointed for it, and to maintain the whole of its poor, whether resident in one part of the parish or another, from one common fund. Neither of the alleged parishes of Mablethorpe, St. Mary and St. Peter, so far as evidence can be procured, has ever maintained its poor separately; but one rate has always been made for the whole of the alleged parish of Mablethorpe; and the poor of the alleged parishes of St. Mary and St. Peter have been jointly and indiscriminately relieved out of such rate, as one common fund, ever since the passing of stat. 43 Eliz. c. 2. There is no evidence tending to show that, at any time, the alleged parishes of St. Mary and St. Peter ever respectively appointed overseers, or levied rates for the relief of their poor. Two overseers have yearly been appointed for the whole of the alleged parish of Mablethorpe. The district, containing both St. Mary and St. Peter, has usually been called in such rates the parish of Mablethorpe; but the rate for 1777 purports to be made for the town of Mablethorpe. The churchwardens of the church of St. Mary have acted as overseers of the poor of the whole of Mablethorpe. As far as evidence goes, one constable only has

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ever been appointed and acted for the whole of the alleged parish of Mablethorpe. The constable's account in the parish chest of Mablethorpe St. Mary, commencing with the year 1706, describes that officer as constable of the town of *Mablethorpe. The roads of St. Mary and St. Peter have always been maintained, as far as evidence goes, by one rate made for the parish of Mablethorpe, as in the case of the poor rate. And the surveyors of the highways have always been selected indiscriminately from the inhabitants of St. Mary and St. Peter, and appointed by the justices to serve the office of surveyors of the highways for the whole of the alleged parish of Mablethorpe, including both districts. A few certificates of settlement and bastardy bonds yet exist in the parish chest of Mablethorpe St. Mary, given to the overseers of the parish of Mablethorpe. The oldest is dated 26th of June, 1711. In all county records (which only go back about 100 years) preserved in the office of the clerk of the peace, such as jurors' lists and county rates, there is no mention of any parish but that of Mablethorpe alone. In modern indictments it is the same. Mablethorpe St. Mary and St. Peter were, by order of the Poor Law Commissioners bearing date the 18th of March, 1837, when the Louth union was constituted, included in such union, and described in the margin thus "36: Mablethorpe St. Mary and St. Peter;" and one guardian only has ever been appointed or acted for both: this order has always been acquiesced in by the inhabitants of both. Mablethorpe St. Mary contains one thousand seven hundred and eighty acres of land, thirty-four houses, and a population of about two hundred and sixty-one. Mablethorpe St. Peter contains one thousand and four acres, fourteen houses, and a population of about sixty-two. In the *Calendarium Inquisitionum Post Mortem*, in the reign of Edward I. are these entries: "Henr' de Saltfleteby. Malberthorpe, terr. &c. (1)." "Philip de Kyme tenet in *Malberthorpe, 14 feod'" (2); and in the reign of Edward II. there are three entries of a like nature, where Malberthorpe is named as before, without distinction of St. Mary or St. Peter (3). In Pope Nicholas's Taxation, A.D. 1291, under the head "Decanatus de Calsewath," appears "Ecclesia de Malberthorpe Sci Petri, 4l. 6s. 8d.

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(1) 6 Edw. I. Inquisition after the death of Henr' de Saltfleteby: *Calendarium Inquisitionum Post Mortem*, vol. 1, p. 63.

(2) 25 Edw. I. Inquisition after the

death of Edmund, Earl of Lancaster: *Calendarium Inquisitionum Post Mortem*, vol. 1, p. 143.

(3) In 10 Edw. II., vol. 1, pp. 286, 287; in 14 Edw. II., vol. 1, p. 296.

Ecclesia de Malberthorp Scæ Mariæ 8l. (1)." In the *Nonarum Inquisitiones* (2), A.D. 1341, under the head "*Decanatus de Calsewath*," is the following entry: "*Malb'thorp*." The two churches are taxed conjointly (*conjunctim*). The same assessors render account for thirteen pounds reserved from the ninth of the beeves, fleeces and lambs, of the parish of *Malb'thorp*, the two churches whereof are taxed ("*agnorum parochiæ de Malb'thorp, cujus quidem ecclesiæ taxantur*") at eighteen and a half marks, as appears by the inquisition taken by the oath of Alan Ward, &c., and others their fellows of the parish aforesaid, jurors ("*et aliorum sociorum suorum parochiæ prædictæ juratorum*"). Of the two churches of the alleged parish of *Mablethorp*, so mentioned in the *Nonarum Inquisitiones*, one was destroyed shortly before the year 1526, and has not been rebuilt, although Lord Willoughby de Eresby, the patron of that church, by his will, dated in that year, directed as follows. Item. "I will that my executors shall, in as convenient and shorte tyme as possible canne, purchase as much lande as shall be necessary for the buylding and setting upp of a new church, and church-yard, to be made and holie buylded at my cost and charge, to the value of cc marks, within the towne of *Malberthorpe* in the county of **Lincoln*, and that to be paid by my executors of the issues, revenues, and profits of all my said manours, land and tenements, those I have appointed for the executions of this my last will, in consideracion that I my selfe take to my owne use all such leade as the said church was coveryd^d w^h of w^h church I am patrone." The *Valor Ecclesiasticus* (3), 26 Hen. VIII., under the general heading "*Malb'thorpe*," contains a separate valuation of the two rectories of *St. Peter* and *St. Mary*. The several institutions to these rectories, *St. Peter* and *St. Mary*, are separately recorded in the book of institutions, remaining in the registry of the Bishop of *Lincoln*. On the 27th of January, A.D. 1491, Edward Strangeways was instituted to the rectory of *Mablethorpe St. Mary*; and on the 30th November, in the same year, Thomas Kyrkeman was instituted to the rectory of *Mablethorpe St. Peter*. From this period the institutions to the rectory of *Mablethorpe St. Mary* are continued to the year 1661; after which time it was legally united to the adjoining rectory of *Staine*; and, from the year 1687 down to the institution of the present incumbent, the Rev. Thomas Lovick Cooper, on the 9th of August, 1831, the benefice, to which the

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(1) P. 59.

(3) Vol. 4, p. 59.

(2) P. 269.

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several rectors were instituted, is described as Mablethorpe St. Mary with Staine. The institutions to the rectory of Mablethorpe St. Peter are continued in the same form, from the year 1491 down to the year 1745 ; but in the institution of the next succeeding rector, in the year 1761, the benefice is described as Theddlethorpe St. Helen with Mablethorpe St. Peter, and is so continued until the institution, on the 6th of December, 1810, of the Rev. Payne Edmunds, the present incumbent. In the year 1737 Peregrine, Duke of Ancaster, *being the patron of Mablethorpe St. Peter, and also of the rectory of Theddlethorpe St. Helen, and the Rev. Robert Owen, being incumbent of both, a deed of union, bearing date the 26th day of October in that year, was duly executed by the then Bishop of Lincoln ; which contains the following recitals : “ Whereas it has been represented unto us by your respective petitions that you, the said most noble Peregrine, Duke of Ancaster and Kesteven, have in your own right the perpetual advowson of the said parish church of Theddlethorpe St. Helen and rectory of Mablethorpe St. Peter, of which church, rectory and parishes you the said Robert Owen are rector, and that the said parishes of Theddlethorpe St. Helen and Mablethorpe St. Peter are contiguous to each other, and the parishes very small, the said parish church of Mablethorpe St. Peter many years since demolished by the violence of the seas, and the parishioners thereby destitute of a place for their public worship, and that the tithes, profits, oblations and obventions yearly arising and accruing within the said parishes were of so small value that they were not sufficient duly to maintain and support two several ministers, and, if united, would not yield more than a competent provision for the support and maintenance of one worthy minister : And whereas, in your said petitions, you have earnestly besought us that we would, for the better service of the cure of the said parishes, and sufficient and competent provision, support and maintenance of a fit and worthy minister, by our episcopal authority unite, annex and consolidate the rectory of Mablethorpe St. Peter, with all its rights, members and appurtenances, to and with the parish church of Theddlethorpe St. Helen, and to add the cure of souls of the said parish of Mablethorpe St. Peter to the said parish of *Theddlethorpe St. Helen, and to do and perform all other matters and things, necessary and requisite to be done and performed, so that the said church and rectory may be taken, accounted and reputed to be but one rectory, now and hereafter, that one minister may be presented and admitted to the

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same whenever the same shall become void, as unto one entire rectory." The deed then purports to unite and consolidate the rectory of Mablethorpe St. Peter with that of Theddlethorpe St. Helen, and to add and annex the cure of souls within the said parish and rectory of Mablethorpe St. Peter to the parish church and incumbent of the parish church of Theddlethorpe St. Helen. This deed was not executed by the then incumbent, nor any churchwarden; and the legality of the union it purports to effect is disputed; nor was it acted upon in the institution which next followed; inasmuch as, on the 21st of May, 1745, John Bland was instituted as rector to the benefice, vacant by the death of Owen, of Mablethorpe St. Peter alone, according to the form of previous institutions. Nevertheless, as before stated, the three institutions, succeeding that of Bland, down to that of the present incumbent, are to the benefice of Theddlethorpe St. Helen with Mablethorpe St. Peter; and the tithes of Mablethorpe St. Peter have been enjoyed by such incumbents so instituted, as they had always previously been by the rector of Mablethorpe St. Peter. In these books of institutions, both Mablethorpe St. Peter and Mablethorpe St. Mary, respectively, are frequently described as parishes, and frequently as Mablethorpe St. Mary, or St. Peter, omitting the word "parish." The inhabitants of the alleged parish of Mablethorpe St. Peter, so far as evidence exists, have not contributed towards the repair of the church situate in the alleged *parish of Mablethorpe St. Mary: but the church rate that has occasionally been made for the repair of such church has been assessed on the occupiers of land wholly situated in the St. Mary's part of the parish, and on such occupiers alone. The tithes of the rectory of Mablethorpe St. Peter have been separately commuted under the Tithe Commutation Act, and are paid to the rector of Theddlethorpe St. Helen with Mablethorpe St. Peter. The tithes of Mablethorpe St. Mary have also in like manner been commuted, and are paid to the rector of Mablethorpe St. Mary with Staine. There are no parochial registers existing of earlier date than the year 1650; the oldest which is deposited in the church of St. Mary, being entitled "A register of all the christenings, marriages and burials within the parishes of Mablethorpe St. Mary and St. Peter from the 26th of March, 1650." The modern register now in use is headed "Mablethorpe St. Mary and St. Peter, in the diocese of Lincoln, 1810." The entries in these registers frequently make a distinction between the two places, and describe the parties as of

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the parish of Mablethorpe St. Mary, or of the parish of Mablethorpe St. Peter with Theddlethorpe St. Helen, as the case may be. Two churchwardens were, from 1601 down to 1712, appointed for Mablethorpe St. Mary, but one only for Mablethorpe St. Peter. Since 1712, only one has been appointed for St. Mary, and, since 1834, none for St. Peter. The question for the opinion of the Court is: "Whether, upon the grounds above mentioned, Mablethorpe St. Mary and Mablethorpe St. Peter ought by law to appoint separate overseers, maintain and manage their own poor separately, and have separate rates and assessments levied on them for *that purpose. It is agreed by the parties that the Court shall have all the power to draw inferences and conclusions from the facts above stated, which a jury, upon the trial of a civil action, would have. If the Court should be of opinion that these places ought by law to appoint separate overseers, and maintain their poor separately, then this rate to be quashed. If the Court should be of a contrary opinion, the rate to be confirmed.

Pashley, in support of the rate :

[915]

The law upon this subject was considered in *Reg. v. Clayton* (1). The conclusion there is that, where the ecclesiastical separation is complete, the two districts may be separate parishes, but not that they necessarily must be. It is not material in the present case, whether the two districts in this case really have been from time immemorial one parish, or two ; for if they were *de facto* one reputed parish at the time stat. 43 Eliz. c. 2, passed it is enough. * * There is, however, very strong evidence that Mablethorpe really was from time immemorial one parish, with two churches in it. It is probable, though only a conjecture, that the origin of the two churches was that one was the chapel belonging to the nunnery ; but, however this may be, the entry in the Nonarum Inquisitiones shows that at that time the parish was treated as one parish, with two churches, and that the inquest was chosen from the parish at large.

Boden, *contrà* :

The inference from the evidence is, that the two rectories were always separate parishes. The mere fact that they are rectories goes far to show it. There is no legal method by which two parishes can unite.

(1) 78 R. R. 400 (13 Q. B. 354).

(LORD CAMPBELL, Ch. J. : But suppose that two distinct parishes had, within legal memory, come to be treated as one, and continued to be so treated and reputed down to the time of 43 Eliz., and had ever since been treated as one under the poor law. How would the law be then ?)

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Mere user cannot unite them. The cases cited are cases where a vill had become a parish by repute ; there is no case in which two parishes have been held to be united. But there is no evidence that, *in fact, these parishes were reputed one in the time of Queen Elizabeth.

[*916]

Pashley was heard in reply.

LORD CAMPBELL, Ch. J. :

I am of opinion that this rate must be confirmed. I can see no sufficient legal ground for disturbing a usage which has prevailed so long. The evidence as to the ancient state of the parish is ambiguous, as, though there is evidence that they were two parishes, there is also evidence that there was from time immemorial one parish with two churches ; the documents, from which it appears that the churches were rated together, and Mablethorpe described as one parish, are strong evidence that way. But I think it enough if at the time when stat. 43 Eliz. c. 2, came into operation they were reputed to be one parish. If they then acted as one parish, and have continued to act as such, the practice cannot be disturbed ; for stat. 43 Eliz. c. 2, intended to cast the obligation of maintaining their poor on those districts then considered to be parishes, without throwing upon the inhabitants the necessity of antiquarian research to ascertain whether those districts really from time immemorial were parishes or not. That is, I think, the result of the early authorities : and I concur in them as it is a reasonable construction of the Act. Then, as a matter of fact, I have not the least doubt that these two districts were treated in the time of Elizabeth as one parish. We find one poor rate, one set of overseers, in short, for all temporal purposes, one parish, as far back as modern evidence goes. Now, though we cannot call from his grave some one to tell us what was the practice in the time of Elizabeth, is not *the uniform practice as far as it can be traced evidence that it was the same then ? I think so ; and therefore I think there should still be one rate.

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ERLE, J. :

I also come to the same conclusion. I infer that the facts are such that this rate should be supported. I do not find any clear evidence to convince me that there ever were two parishes. The two are spoken of as separate in early records; but, in very early times, so early that parishes were still almost in the course of formation, we find Mablethorpe spoken of as one parish, with two churches. And, whatever might be their state as to ecclesiastical matters, this is a question as to civil rights; and as far back as living memory goes these rectories have for civil purposes been treated as one parish: and I see no reason to think that they are not one.

CROMPTON, J. :

I am of the same opinion, that this is one parish for the purposes of stat. 43 Eliz. c. 2. After the long usage, and considering the other evidence, more particularly the fact that the highways have been kept up as if the parish was one, and the old entry in the Nonarum Inquisitiones, I should, notwithstanding the other evidence, draw the conclusion of fact that this was from time immemorial one parish, if that finding were necessary to support the usage. But I incline to think it enough if it was so reputed at the time of the passing of stat. 43 Eliz. c. 2. The decisions so soon after the statute are weighty authorities on its own construction. Even if I thought them wrong, I should not break in upon that wholesome rule by which the contemporaneous construction of a statute has great weight. And, though *it is true that, in the cases referred to, the reputed parish was part only of a real parish, I can see no difference in principle between a reputed parish consisting of more than a real parish, and a reputed parish consisting of less than the real parish. I wish to speak with diffidence on a part of the law with which I am not familiar, and rather rest on the inference of fact which I am prepared to draw, that this always was one parish.

[*918]

(No fourth Judge was present.)

Rate affirmed.

CARPENTER *v.* DUNSMURE.

(3 EL. & BL. 918—929; S. C. 2 W. R. 549.)

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[918]

M., being seised in fee, devised to her daughter E., to hold to E., "her heirs, executors, administrators and assigns, for and during the natural lives of" E., E.'s husband, and their daughter, and of the survivor; and, in case the three "should all depart this life before the expiration of thirty-one years, to be computed from the day of my decease, then to hold" "unto the executors, administrators and assigns" of E., "for and during the said term of thirty-one years, to be computed from the day of my decease." "And I do hereby give, devise and bequeath the reversion of the aforesaid messuages," &c. "to my grandson," W. O. S., second son of J. T. S., "and to the heirs male of the said" W. O. S., remainder to the third, fourth &c. sons of J. T. S. successively in tail male, and, in default of such issue, to the eldest son of J. T. S. in fee:

Held that, E. having died before the other two lives expired, her heir took the land, as special occupant.

A SUMMONS having been issued, at the suit of the plaintiff, against the defendant, by consent of parties, and by the order of ERLE, J., a case was stated for the opinion of this Court, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 46): which case, so far as is material to the present decision, was as follows.

Dame Margaret Stanley, widow, was, at the date and execution of the second codicil to her will, hereinafter *set out, and thenceforth continued and was at the time of her death, seised to her and her heirs for an estate of inheritance in fee simple of and in certain messuages, lands and hereditaments, situated in the parish of Holyhead in the county of Anglesey. She duly made and published her last will and testament in writing, and the several codicils thereto hereinafter mentioned. The will and codicils were respectively executed and attested in such manner as required by law for passing freehold estates by devise.

[*919]

The will was dated 12th August, 1812. The first codicil was dated 27th June, 1815. But neither the will nor the first codicil relate to the dispute between the plaintiff and the defendants.

The second codicil was dated 8th September, 1815, and was as follows.

"This is a second codicil to my will; which will bears date the 12th day of August, 1812. I give, devise and bequeath to my daughter Emma Carpenter all that messuage or tenement, with the appurtenances," &c., "situate" &c., "these said premises &c. &c. I do hereby give, devise and bequeath to my said daughter Emma Carpenter; to hold to her, her heirs, executors, administrators and assigns, for and during the term of the natural lives

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of herself, the said Emma Carpenter, Digby Thomas Carpenter, Esquire, her husband, and Margaret Anne Carpenter, their daughter, and the natural lives and life of the survivors and survivor of them. And, in case the said Emma Carpenter, Digby Thomas Carpenter and Margaret Anne Carpenter should all depart this life before the expiration of thirty-one years, to be computed from the day of my decease, then to hold the said messuage or tenement," &c.

[*920] "unto the executors, *administrators and assigns of the said Emma Carpenter, for and during the said term of thirty-one years, to be computed from the day of my decease." Other land was devised with precisely the same limitations. "And I do hereby give, devise and bequeath the reversion of the aforesaid messuages or tenements," &c., "to my grandson William Owen Stanley, the second son of my son Sir John Thomas Stanley, Baronet, and to the heirs male of the said W. O. Stanley, lawfully issuing; and, in default or failure of such issue, to the use of the third, fourth, fifth, sixth and all and every other son and sons of the said Sir J. T. Stanley, lawfully begotten, severally and successively in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, lawfully issuing, the eldest of such sons, and the heirs male of his body, lawfully issuing, being always to be preferred and to take before the younger of such sons, and the heirs male of his or their body or bodies issuing; and, in default of such issue, to the use of my grandson Edward John Stanley, eldest son of my said son Sir J. T. Stanley, and the heirs and assigns of the said E. J. Stanley for ever."

The third codicil was dated 8th September, 1815, but does not relate to the dispute between plaintiff and defendants.

The testatrix died some time in the year 1816, without having altered or revoked her will and codicils: and the same were duly proved on 6th July, 1816, in the Prerogative Court of the Archbishop of Canterbury, by Sir J. T. Stanley, Baronet, her son and sole executor.

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At the time of the death of the testatrix, the said Emma Carpenter, her husband the said Digby Thomas Carpenter, and their daughter the said Margaret Anne Carpenter, were all living. And the said Emma Carpenter, or the said Digby Thomas Carpenter in her right, from that period received the rents and profits arising from the messuages, lands and hereditaments

devised by the said second codicil, until her death, which happened in August, 1842, Digby Thomas Carpenter and M. A. Carpenter being then alive.

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Emma Carpenter made no disposition, by will or codicil, of the messuages, lands or hereditaments devised by the said second codicil of the said Dame Margaret Stanley. The case stated that she executed by will a power of appointment, given by her marriage settlement, over certain funds, but appointed no executor; and, her husband renouncing, letters of administration *cum testamento annexo*, so far only as concerned the funds which she could dispose of by her marriage settlement, were, on 4th June, 1851, granted to her son, a principal legatee under her will.

From and after the death of Emma Carpenter, her husband, the said Digby Thomas Carpenter, received the rents and profits arising from the messuages &c. devised by the second codicil until his death, which happened in the month of September, 1853, his daughter the said Margaret Anne Carpenter being then and still alive.

The case stated that Digby Thomas Carpenter, on 20th June, 1853, by will duly executed and attested, devised and bequeathed all the estate and interest to which at the time of his decease he might be entitled of and in the messuages, &c., which were the subjects of the devise in the said second codicil, to and to the use of the plaintiff in fee, and appointed the defendants his executors.

[*922]

The plaintiff takes no other interest under his father's will: and the same was duly proved, on 20th October, 1853, in the Prerogative Court of the Archbishop of Canterbury, by the defendants.

The plaintiff is the only son and heir-at-law of his mother, the said Emma Carpenter.

The questions for the opinion of the Court are :

First: What estate or interest (if any) passed to the plaintiff under the second codicil to the will of the said Dame Margaret Stanley, upon the death of his mother the said Emma Carpenter.

Second: What estate or interest (if any) passed to the plaintiff under the will of his father, the said Digby Thomas Carpenter, of and in the messuages, lands and hereditaments devised by the second codicil of the said Dame Margaret Stanley.

The plaintiff and defendants agree that such judgment shall be entered for or against the plaintiff, or for or against the

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DUNSMURE. defendants, immediately after the decision of this case, as the Court may think fit: and that judgment shall be entered accordingly, and, if the plaintiff succeeds, for such sum as the plaintiff and defendants shall mutually agree upon.

L. H. Bayley, for the plaintiff. * * *

[925] *Fortescue*, *contra*. * * *

[927] LORD CAMPBELL, Ch. J.:

[•928] We are called upon to explain a very inartificial clause, such as we are not likely to meet with again. The question is, Whether, the land being given to Emma and her heirs *pur autre vie*, her heir is not entitled to take as special occupant. He certainly is so entitled, unless you can strike out the word "heirs:" it must go to him, if you give effect to the word. Had we found any subsequent clause inconsistent with this view, we might take a liberty with the word, and mould it, which has sometimes been done rather freely, but which, I think, should be done abstinently. But I do not think that *Mr. Fortescue* has pointed out any such inconsistency. If this were a *deed, *Atkinson v. Baker* (1) would be decisive in favour of the plaintiff: and, so far as the present question is concerned, I see no difference between a deed and a will. In the case of separate clauses, which are inconsistent, you give the preference to the earlier clause in a deed and to the later in a will: but here the question does not arise upon separate clauses, but upon a single clause, which must have a single meaning; and the only question is, What that single meaning is. I think the meaning was that the heir should take.

ERLE, J.:

I am of the same opinion, on the ground that we are to construe a will according to the words which we find in it. The land is given to Emma Carpenter and her heirs for three lives. Is her heir to take, if she dies before the expiration of the three lives? He must do so, unless the word is to be struck out. It is supposed that this will defeat some other limitations. It does not appear to me that *Mr. Fortescue* has shown that it will do so. But, if we had conflicting limitations, still, there being one which is clear, we must have adhered to it unless the limitations supposed to conflict with it were equally clear. Now the intention to give to

(1) 2 B. R. 366 (4 T. R. 229).

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the heir is here, at least, more clear than an intention to give to the executors; for, when we look at the limitation which follows the first, we find that “executors” are mentioned but “heirs” left out; so that it is manifest that the devisor, in using the word “heirs,” selected it as clearly designating something distinct from “executors.”

CROMPTON, J.:

[929]

I am quite of the same opinion. We cannot reject words which are inserted expressly. The devisor gives an estate which is partly freehold, and then goes on to give other estates. It is said that other limitations show that she meant to give this latter to the executors. But there is much force in the observation that she must mean “heirs,” when she uses that word, inasmuch as she afterwards omits it when she is giving an interest to executors. And it may be further observed that, when she comes to create a freehold estate again, she again uses the word “heirs.” We therefore cannot reject that word; and, if we do not, the rest follows.

(No fourth Judge was present.)

Judgment for the plaintiff.

CHURCHILL v. SIGGERS (1).

(3 EL. & BL. 929—941; S. C. 2 C. L. R. 1509; 23 L. J. Q. B. 308; 18 Jur. 773; 2 W. R. 551; 23 L. T. O. S. 220.)

1854.
June 9, 15.
[929]

Where it appears by the declaration that defendant has recovered a judgment for debt and costs against plaintiff, and has issued a *ca. aa.* indorsed to satisfy the whole of the debt and costs, and afterwards the debt itself has been satisfied (as where the judgment is recovered by the holder of a bill of exchange against the acceptor, and the drawer, for whose accommodation the bill had been accepted, pays to the holder the amount due on the bill), so as to reduce the sum remaining due on the judgment to a sum below 20*l.*, and that afterwards the defendant has delivered to the sheriff's bailiff a warrant indorsed to satisfy the whole debt and costs, and has procured plaintiff to be arrested to satisfy the whole, and there is an allegation of malice and want of probable cause, and of special damage, by means of the premises, in the plaintiff being prevented from attending to his business, being injured in his credit, and incurring expense in procuring his liberation by a Judge's order, such facts show a good cause of action:

So held, on demurrer to the declaration.

THE declaration alleged that plaintiff, at the request and for the accommodation of Mary Ann Helps, accepted two bills of exchange,

(1) Cited, *The Walter D. Wallat* [1893] P. 202, 205, 62 L. J. Ad. 88, 69 L. T. 771.

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drawn by her, payable to her order, for 68*l.* and 32*l.* 10*s.*, respectively; that M. A. Helps indorsed them in blank; and defendant, *knowing them to be accommodation bills, discounted them for her, and became the legal holder thereof. That afterwards M. A. Helps intermarried with one John Kinder Cheese. That thereupon, and after the bills became due, defendant commenced, in the Court of Queen's Bench, two separate actions on them, one against plaintiff as acceptor, the other against J. K. Cheese and his wife by reason of the wife having been, before marriage, drawer and indorser. That defendant recovered against plaintiff the amount of the two bills, to wit 100*l.* 10*s.*, and 48*s.* for interest, together with 12*l.* 4*s.* for costs; in all, 115*l.* 2*s.*; and caused a *ca. sa.* to be issued on the judgment, directed to the Sheriff of Middlesex, commanding them to take plaintiff &c., to satisfy the defendant 115*l.* 2*s.*, with interest from the day of the judgment: which writ was indorsed with a direction to levy 115*l.* 2*s.*, together with the said interest; and defendant delivered the writ to the sheriff; who, before the return, directed their warrant to certain bailiffs, commanding them to take plaintiff &c.: that the warrant was not executed during that shrievalty, and became of no force. That, after the granting of the said warrant, defendant caused to be issued in the action against J. K. Cheese a *capias*, directed to the Sheriff of Surrey, commanding him to take J. K. Cheese, and keep &c., until he should have given bail, or made deposit, or by other lawful means be discharged from custody: which writ was delivered to the said sheriff to be executed, having been previously indorsed for bail for 100*l.*, by order of CROMPTON, J., the sum of 100*l.* 10*s.* being the amount of the two bills: that the sheriff arrested J. K. Cheese, and detained him in custody; and J. K.

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Cheese, while *so in custody, paid to defendant, "who then took and accepted the same from him, the sum of 110*l.* 10*s.*: that is to say, the sum of 100*l.* for the debt in the said action as aforesaid, and for which the said J. K. Cheese was so authorized to be held to bail as aforesaid, and the sum of 10*l.* 10*s.* for the costs and charges in such action and incidental thereto. And thereupon the whole of the defendant's said causes of action against the said J. K. Cheese, to wit on the said two bills of exchange, was then fully paid, discharged and satisfied, as the defendant did then acknowledge and admit." "That, after the said causes of action were so fully satisfied as aforesaid, and after the said warrant on the said *capias ad satisfaciendum* so obtained

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from the said " Sheriff of Middlesex had expired, by reason of the then shrievalty having expired, " the defendant, falsely, maliciously, and without any reasonable or probable cause whatever, caused and procured " the succeeding Sheriff of Middlesex " to make and grant their certain other warrant in writing, under their hands and seal of office, as such sheriff, upon the said writ of *capias ad satisfaciendum* which had so remained unexecuted as aforesaid, and which the now defendant had so issued against the now plaintiff as aforesaid, directed to certain bailiffs of the last mentioned sheriff, commanding such bailiffs to take the now plaintiff and him safely keep," &c., " to satisfy the now defendant the said sum of 115*l.* 2*s.* so recovered against him as aforesaid; which said warrant was then indorsed with a direction to the said bailiffs to levy such sum of 115*l.* 2*s.*: and thereupon *the now defendant, falsely and maliciously, and without any reasonable or probable cause for so doing, caused and procured the said last mentioned warrant to be delivered to such bailiffs, and, falsely and maliciously, and without any reasonable or probable cause, caused and procured the said bailiffs to arrest and take the plaintiff by his body upon the said warrant to satisfy the defendant the said sum of 115*l.* 2*s.*, so pretended to be then due to him as aforesaid." That defendant was accordingly, on 22nd December, 1852, taken and imprisoned on such warrant, " and lodged accordingly in her Majesty's Debtors' Prison for London and Middlesex, and there kept and detained for a long time, upon and by virtue of such last mentioned warrant, to wit four weeks, until the plaintiff could procure his discharge from such custody by applying to Sir Charles Crompton, Knight, one of the Judges of the said Court, who then made an order that the plaintiff should be discharged out of such custody." " That, at the time when the defendant so, maliciously, and without any reasonable cause, caused him to be imprisoned as aforesaid upon the said *capias ad satisfaciendum*, the judgment upon which such writ was founded was a judgment obtained in her Majesty's Court of Queen's Bench as aforesaid upon a debt amounting, to wit, to the aggregate of the said two bills of exchange as aforesaid; and that such debt was the only sum recovered in such action, exclusive of the costs recovered by such judgment: and that, at the time of such arrest and imprisonment of the plaintiff as aforesaid, such debt did not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment. And the plaintiff further saith that, by means *of the premises, he not only

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[*933]

CHURCHILL was prevented from attending to his affairs and business, and was
 v. injured in his credit and character, but also, by means of the pre-
 SIGGERS. mises, he was put to and incurred great costs and expenses, to wit
 to the amount of 50*l.*, in and about procuring his liberation and
 release from the said imprisonment."

Demurrer. Joinder.

The case was now argued (1).

Ogle, for the defendant:

It is by no means clear what cause of action is intended to be set up by the declaration. The complaint might be either for arresting for a sum under 20*l.*, or for arresting for a larger sum than was really due. The first, however, cannot be maintained, because stat. 7 & 8 Vict. c. 96, s. 57, applies only where the sum recovered does not exceed 20*l.*, exclusive of costs; and here the sum recovered was 100*l.* 10*s.*, with 2*l.* 8*s.* interest, exclusive of costs. Then, assuming the complaint to be that, the payment by Cheese having satisfied 100*l.* of the debt on which the judgment against the plaintiff was recovered, the *ca. sa.* and warrant against the plaintiff were indorsed for 115*l.* 2*s.*, with interest, and the plaintiff taken on the warrant so indorsed; the question is whether that shows a right of action. It is not shown that the plaintiff has been damaged.

(LORD CAMPBELL, Ch. J.: Suppose he had 15*l.* in his pocket, but not 115*l.*)

[*934] That should, at any rate, be alleged as special damage. An action for breach of contract may be maintained, though the damage be merely nominal: but an action *ex delicto* *cannot, without actual damage. In *Tancred v. Leyland* (2) it was held that an action in tort could not be maintained by tenant against landlord for distraining for more than was due, without an allegation that the amount taken or sold was unreasonable in respect of what was really due. In *Gallwey v. Marshall* (3) it was held that no action lay for words imputing incontinency to a clergyman, unless he held a benefice or some office of temporal profit; there being no actual damage.

Pearson, contra:

It is now no objection to a declaration that it discloses more

(1) Before Lord Campbell, Ch. J., Q. B. in *Leyland v. Tancred*, 83 R. R. Erle and Crompton, JJ. 659 (16 Q. B. 664).

(2) 83 R. R. 663 (16 Q. B. 669), in (3) 96 R. R. 721 (9 Ex. 294).
 Ex. Ch.; reversing the judgment of

than one cause of action without showing which is relied on. As to stat. 7 & 8 Vict. c. 96, s. 57, there seems ground for contending that the word "recovered" applies more properly to what a plaintiff actually and properly gets than to the nominal amount of the verdict. But, at any rate, actual damage is here shown. The difficulty of the judgment debtor obtaining the sum indorsed on the writ is greater, the larger the sum indorsed.

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(ERLE, J.: In *Tancred v. Leyland* (1) the Exchequer Chamber seemed to think that, as there might have been a distress, whatever the amount due, no harm was done by naming too large an arrear.)

In that case there was no allegation of malice.

(CROMPTON, J.: How do you say that the difficulty of raising the sum indorsed affects the present plaintiff? The sheriff has no authority to receive the sum from him, but must bring the body into Court.)

The declaration avers that by means of the premises the *plaintiff was prevented from attending to his affairs, and was injured in his credit and put to expense. An action lies for such damage resulting from a proceeding taken maliciously and without probable cause. In *Wentworth v. Bullen* (2) this Court clearly considered that to indorse a *ca. sa.* with a sum above the amount due, and execute it by caption, was a wrong for which an action would lie. * * In *De Medina v. Grove* (3) the complaint was much the same as here, except that there was not, as here, any allegation of malice and want of probable cause; and in the absence of such allegation, it was held that the action did not lie. * * A malicious arrest for too much on mesne process is clearly actionable, as appears from *Austin v. Debmam* (4) and *Ross v. Norman* (5): and the malice may be shown by the amount of debt as reduced by *payments or counter claims: *Sims v. Jaquest* (6), *Dronefield v. Archer* (7). That rests upon the ground of extortion; a ground equally applicable to arrest on final process.

[*935]

[*936]

(LORD CAMPBELL, Ch. J.: The analogy would be close if you could

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| (1) 83 R. R. 663 (16 Q. B. 669). | 231 (10 Q. B. 152). |
| (2) 33 R. R. 353 (9 B. & C. 840). | (4) 3 B. & C. 139. |
| (3) 74 R. R. 243 (10 Q. B. 172), in | (5) 5 Ex. 359. |
| Ex. Ch.; affirming the judgment of | (6) 10 Bing. 510. |
| Q. B. in <i>De Medina v. Grove</i> , 74 R. R. | (7) 5 B. & Ald. 513. |

CHURCHILL show that an arrest, on final process, for the larger sum differs from
 S. SIGGERS. an arrest for the smaller sum.)

The allegation of special damage connects the injury to the plaintiff with the arrest for too much.

(LORD CAMPBELL, Ch. J. : But can they be so connected in law ?

CROMPTON, J. : In the case of a *fi. fa.* the sheriff has to take goods to the amount named ; but he does not take the body more for much than for little. How is this plaintiff affected by the direction to the sheriff ?)

The party arrested may pay into Court, or to the plaintiff's attorney : but the attorney is not bound to receive less than the sum indorsed.

Ogle, in reply. * * *

Cur. adv. vult.

[937] LORD CAMPBELL, Ch. J., on a later day in this Term (15th June), delivered the judgment of the Court :

We are of opinion that on this demurrer the plaintiff is entitled to judgment.

To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful ; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is *prima facie* lawful ; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the Court or a Judge that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause :
 [*938] *i.e. the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor. The Court or Judge, to whom a summary application is

made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment and have been utterly ruined in his circumstances.

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It has been argued that, where the process of execution is a writ of *capias ad satisfaciendum*, the action will not lie, because the sheriff is merely commanded to take the body of the debtor to satisfy the sum recovered by the judgment; that, where the debtor's body may be lawfully taken, the sum indorsed upon the warrant is immaterial; and that, as the sheriff has no authority by the writ to liberate the debtor on receiving from him the whole sum recovered or any part of it, in point of law no damage can be considered as having accrued to the debtor. But it is obvious to common sense that the debtor may be grievously damnified by reason of the execution under a *ca. sa.* being for the full amount of the sum recovered by the judgment when only a very small sum is due. His imprisonment is thereby likely to be greatly prolonged; and, though by the mere force of the writ the sheriff is not authorized to receive the money to levy which is the real object of the execution, it is well known, and may be capable of proof, that, in practice, the attorney for the judgment creditor may name a special bailiff to whom the warrant is to be directed, and that he is authorized to discharge the debtor on payment of the sum indorsed on the warrant to be levied, with poundage and other expenses. At *any rate it is quite clear that, by a declaration on the warrant that the whole sum recovered is to be levied, although the greatest part of it has been paid, the debtor must be greatly embarrassed and delayed in raising the small balance remaining due, and in applying for his discharge. There appears to be no authority amounting to an express decision that such an action is maintainable: but we think there is a strong indication by the majority of the Judges who took part in the decision of *Wentworth v. Bullen* (1), *Saxon v. Castle* (2), *De Medina v. Grove* (3), that, with an allegation of malice and want of reasonable or probable cause, such an action is maintainable, although not without that allegation. In the last case WILDE, Ch. J. does say (4): "The plaintiff here might have applied, if the state of facts justified the application, either, before the arrest, to have satisfaction entered up, or, after the arrest, to be discharged. It might therefore be a question whether, even with all proper averments on

[*939]

(1) 33 R. R. 353 (9 B. & C. 840).

(2) 6 Ad. & El. 652.

(3) 74 R. R. 243 (10 Q. B. 172).

(4) 74 R. R. 247 (10 Q. B. 177).

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the record, the proper remedy would be by action. For it might be contended that what is complained of by the plaintiff was mere irregularity." With great respect, we do not think that there is any irregularity in such a proceeding, the *ca. sa.* and warrant following the judgment. But, if there be malice and want of reasonable or probable cause, we do not for this purpose see the difference between an arrest for an excessive sum on mesne process and such an arrest in execution. The increased difficulty in obtaining a discharge may be as great a prejudice in the one case as finding bail for a larger sum in the other.

[940]

If the action will lie, we are now to see whether in the present declaration the wrong and the damage are sufficiently alleged. The plaintiff, after clearly showing that 100*l.* of the 115*l.* 2*s.* for which the judgment was recovered had been satisfied, goes on to allege that "the defendant, falsely, maliciously, and without any reasonable or probable cause whatever, caused and procured" the sheriff to make and grant their warrant upon the said writ to bailiffs, commanding them "to take the now plaintiff and him safely keep," &c., "to satisfy the now defendant the said sum of 115*l.* 2*s.*," &c., "which said warrant was then indorsed with a direction to the said bailiffs to levy such sum of 115*l.* 2*s.*: and thereupon the now defendant, falsely and maliciously, and without any reasonable or probable cause for so doing, caused and procured the said last mentioned warrant to be delivered to such bailiffs, and, falsely and maliciously, and without any reasonable or probable cause, caused and procured the said bailiffs to arrest and take the plaintiff by his body upon the said warrant to satisfy the defendant the said sum of 115*l.* 2*s.*, so pretended to be then due to him as aforesaid." It is said that there is no allegation that the defendant indorsed the warrant to levy the full sum of 115*l.* 2*s.*, or gave any special directions to the sheriff. But the indorsement was a plain assertion that the whole sum remained due, and that the object of the execution was to compel payment of the whole of that sum; and the making of the warrant, the indorsement, and the arrest, are all alleged to have been caused by the defendant maliciously and without reasonable or probable cause.

[*941]

Objection is next taken that there is no sufficient allegation of damage. But the plaintiff goes on to *allege that he was accordingly taken and imprisoned on such warrant, and lodged in gaol, "and there kept and detained" for four weeks, until he "could procure his discharge from such custody, by applying to" one of the Judges

of this Court, who made an order that he should be discharged out of custody : and that, “ by means of the premises, he not only was prevented from attending to his affairs and business, and was injured in his credit and character, but also, by means of the premises, he was put to and incurred great costs and expenses ” “ in and about procuring his liberation and release from the said imprisonment.” It is said that it might have been all the same if he had been arrested, as he lawfully might have been, merely to satisfy the balance of 15*l.* 2*s.* But he alleges, and undertakes to prove, that the long imprisonment was caused by the excessive sum being marked on the warrant to be levied ; and that what he suffered, and the expense he incurred, arose “ by means of the premises,” viz. the defendant having so maliciously and without reasonable or probable cause caused the warrant to be delivered to the bailiffs indorsed with the direction to the bailiffs to levy the full sum of 115*l.* 2*s.*, and having caused him to be arrested to satisfy that sum. Therefore it seems to us that he sufficiently connects what he says he has suffered with the wrongful acts of the defendant ; and that there ought to be judgment for the plaintiff.

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Judgment for plaintiff.

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(3 EL. & BL. 942—953 ; S. C. 23 L. J. M. C. 173 ; 18 Jur. 1022 ; 2 W. R. 555.)

1854,
June 10.

[942]

Where a prosecution, though criminal in form, is in substance merely a proceeding for trying a civil right, the Court, after an acquittal, will grant a new trial for misdirection or a verdict contrary to the evidence, and will not restrain itself to correcting the miscarriage by merely suspending the judgment.

Quære, whether an indictment for obstructing a navigation by erecting a wall be within this rule.

Per Lord CAMPBELL, Ch. J., and *semble* per CROMPTON, J., it is not.

Per COLERIDGE, J., *semble* that it is ; but that in cases within the rule the misdirection or finding against evidence must, to justify granting a new trial, be more palpable than is requisite in proceedings which are civil in form.

The Judge, on the trial of such an indictment, asked the jury whether they thought the erection would prove “ a material nuisance,” in which case they were to find a verdict of Guilty ; but told them that, if they thought the “ nuisance ” was so slight, rare and uncertain that the defendant ought not to be made criminally liable for it, they should acquit him : and, the jury saying that they considered the erection, “ although a nuisance, was not sufficiently so to render the defendant criminally liable,” he directed an acquittal. On motion for a new trial for misdirection :

Held, by COLERIDGE and CROMPTON, JJ., and *semble* per Lord CAMPBELL, Ch. J., that the charge was to be understood as meaning, not that a party

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may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction in question was so insignificant. And that therefore there was not a misdirection warranting a new trial.

[*943]

THE indictment charged that, from time whereof &c., there was and is a parcel of land covered with water, situate &c., used by all the liege subjects &c., with their ships and other sailing vessels, steam vessels and boats, to go, return, pass, repass, labour, stay and anchor, at their free will and pleasure, without any obstruction, hindrance or impediment: and that there is, upon the said land, a large bank of sand and earth, situate &c., which at times is covered with water, and over which the said liege subjects are then accustomed, with their ships, vessels and boats aforesaid, to go, pass and repass, as aforesaid: and, from time whereof &c., the said liege subjects have been used and accustomed, and still &c., to anchor their said ships, vessels and boats to and into the said bank, without any let, hindrance or obstruction whatsoever. That defendant, well knowing the premises, *but intending and contriving to impede and hinder the said liege subjects from going, returning, passing and repassing, staying and anchoring, in, over and upon the said land so covered with water as aforesaid, and in over and upon the said bank when covered with water as aforesaid, did, on &c., at &c., unlawfully and injuriously erect, put and place on and across the said bank, and over and across the said land so covered with water as aforesaid, a certain stone wall of great length and height, to wit of the length of two hundred yards and of the height of three feet, and did there and then, unlawfully and injuriously, put and place divers, to wit twenty, heaps of large stones in and upon the said bank and the said land so covered with water; and the said stone wall so erected, put and placed, and the said heaps of stone so put and placed, from the said &c. until the day of the taking of this inquisition, did there unlawfully and injuriously continue, and still doth continue; so that the liege subjects &c., during the time aforesaid, could not, and still cannot, go, &c. with their ships, &c. in and over the said land so covered with water, and in and over the said bank when covered with water as aforesaid, as they ought and were wont and accustomed to do. To the great damage and common nuisance of her Majesty's liege subjects going, returning &c. in, over and along the said land so covered with water, and the bank aforesaid; to the evil example &c., and against the peace &c.

Plea: Not guilty. Issue thereon.

On the trial, before Williams, J., at the last Assizes for Carnarvonshire, it appeared that the defendant had in fact erected a wall or embankment on the place described; but a question arose, whether, upon the *evidence, it appeared that what had been done produced an inconvenience sufficiently important to render him criminally liable; and *Rex v. Tindall* (1) was cited for the defendant. The learned Judge asked the jury, whether they thought the embankment would prove a material nuisance, directing them, in that case, to find a verdict of Guilty; adding that, if they thought the nuisance was so slight, rare and uncertain that the defendant ought not to be made criminally liable for it, they should acquit him. The jury said that they considered that the embankment, although a nuisance, was not sufficiently so to render the defendant criminally liable. The learned Judge then directed a verdict of Not guilty.

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[*944]

In last Easter Term, *G. O. Morgan* obtained a rule *nisi* for a new trial, on the grounds of misdirection and that the verdict was against the weight of evidence.

Welsby and *M'Intyre* showed cause (2) :

First, as the defendant has a verdict in a criminal case, a new trial for misdirection cannot be granted.

(LORD CAMPBELL, Ch. J. : A round about practice used to prevail, of staying judgment where it was considered that there had been misdirection. But is not the direct mode the more convenient one ?)

The authorities appear not to support the adoption of such a mode. In *Reg. v. Chorley* (3) the rule was made absolute for a new trial: but that was not the form of the rule *nisi*: and it rather appears that the rule absolute was drawn up inadvertently. In **Reg. v. Leigh* (4) a new trial was granted after a verdict for the defendants: but the question was scarcely discussed.

[*945]

(LORD CAMPBELL, Ch. J. : The direct mode at least appears to be the best when the question is substantially as to a civil right.)

At any rate, the new trial will not be granted on the question of

(1) 45 R. R. 426 (6 Ad. & El. 143). ridge and Crompton, JJ.

(2) The earlier part of the argument (3) 76 R. R. 320 (12 Q. B. 515).

was heard on Thursday, June 8th, (4) 50 R. R. 463 (10 Ad. & El. 398).
before Lord Campbell, Ch. J., Cole-

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the weight of evidence: that distinction has been pointed out in the case of penal actions by Lord KENYON: *Wilson v. Rastall* (1).

(*Joseph Brown, amicus Curie*, mentioned *Hall v. Green* (2).)

COLERIDGE, J.: A penal action may have been thought odious.)

In *Rex v. Sutton* (3) the COURT acted on the precedent of *Rex v. Wandsworth* (4) by suspending the judgment, and refused to make a precedent for granting a new trial after an acquittal. *Rex v. Russell* (5) was there cited: but in that case the objection that a new trial could not be granted for misdirection was not taken. *Reg. v. Chorley* (6) was a case of improper reception of evidence and misdirection.

(LORD CAMPBELL, Ch. J.: You may perhaps be justified in contending that this indictment may really charge an offence, and that the verdict will not bind any right.)

Secondly, there was no misdirection. The learned Judge, in effect and almost in words, left the case to the jury in conformity with the language of the judgment in *Rex v. Tindall* (7), where, upon a special verdict finding that, "by the defendant's works, the harbour is in some extreme cases rendered less secure," this Court held [*946] "that no person can be made criminally responsible for *consequences so slight; and uncertain, and rare, as are stated by this verdict to result from the works of the defendants," and ordered a verdict of Not guilty to be entered. * * The question here was, whether there was a material obstruction; and in that sense only [*947] can the jury *have understood the words of the learned Judge when he spoke of a "nuisance." They cannot have supposed that, if the facts showed what amounted really to a nuisance, *commune nocumentum*, the defendant was to be acquitted. * * And the jury, when they found that the embankment was a "nuisance" but not so sufficiently to render the defendant criminally liable, must have meant what, in more strict language, would be expressed by saying that there was an obstruction, but not one sufficient to amount to a nuisance.

(1) 2 R. R. 515 (4 T. R. 753, 758).

(2) 96 R. R. 693 (9 Ex. 247).

(3) 39 R. R. 388 (5 B. & Ad. 52).

(4) 18 R. R. 434 (1 B. & Ald. 63).

(5) 30 R. R. 432 (6 B. & C. 566).

(6) 76 R. R. 330 (12 Q. B. 515).

(7) 45 R. R. 426 (6 Ad. & El. 143,

152).

Thirdly, the verdict was justified by the evidence. (The argument as to this is omitted.)

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G. O. Morgan, contra:

This prosecution is in the nature of a proceeding for enforcing a civil right.

(LORD CAMPBELL, Ch. J.: Do you say that, if a man were indicted for keeping up an offensive manufactory, we could set aside a verdict of Not guilty on the ground of its being contrary to the evidence? (1).)

The nearest analogy appears to be that of an indictment for non-repair of a high road.

(LORD CAMPBELL, Ch. J.: That is very much in the nature of a question as to a civil right: the fine imposed is usually nominal: but can we know that here the conduct of the defendant, if he had been found Guilty, might not have been such as to demand substantial punishment? (1).)

The COURT, in *Reg. v. Cricklade* (2), made *absolute a rule for a new trial, after a verdict of Not guilty; Lord DENMAN, Ch. J. saying, that a precedent had been established in *Reg. v. Chorley* (3). [*948]

(CROMPTON, J.: In *Reg. v. Chorley* (3) there was no question as

(1) *Dicta* disapproved: *Reg. v. Stephens* (1866) L. R. 1 Q. B. 702, 709, 7 B. & S. 710, 35 L. J. Q. B. 251, 14 L. T. 593.

(2) *Reg. v. The Inhabitants of Cricklade, St. Sampson*. January 12th, 1849. This was an indictment of the inhabitants of a parish for non-repair of a highway, charged as a public carriage way and as a horse and pack and prime way: to which defendants pleaded Not guilty: and, on the trial (before Platt, B., Wiltshire Spr. Ass. 1848), a verdict of Not guilty was found. In Easter Term following, *Crowder* obtained a rule *nisi* for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence. *J. Greenwood and Hodges* now showed cause, contending

that a new trial could not be granted after a verdict for defendants in a criminal case; at any rate, not on these grounds. *Crowder* was heard in support of the rule. Some of the authorities in the text were referred to. The COURT (Lord DENMAN, Ch. J., PATTESON, COLERIDGE and WIGHTMAN, JJ.) made the rule absolute as to the counts charging a horse and pack and prime way, Lord DENMAN, Ch. J., saying that a precedent had been established in *Reg. v. Chorley*:† that some judgment must be given; and that the COURT would not give a judgment which it saw to be wrong. For the proceedings on the second trial, see *Reg. v. Cricklade*.‡

(3) 76 R. R. 330 (12 Q. B. 515).

† 76 R. R. 330 (12 Q. B. 515).

‡ 80 R. R. 390 (14 Q. B. 735).

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to any substantive offence; it was a contest between the right of the public and the right of an individual to a footway.)

The COURT seems to have considered *Reg. v. Cricklade* to be a criminal case: that was an indictment for non-repair of a road.

[*949]

There is a clear misdirection. In *Rex v. Tindall* (1) it was not found that there was a nuisance, or even an obstruction: the case decides merely that there may be acts producing results so slight as not to amount to a nuisance. But here the Judge asked the jury if the facts showed a material nuisance, and told them to acquit the defendant if they thought the nuisance so slight that he ought not to be made criminally liable for it. But, if there was a nuisance at all, the defendant should have been found Guilty: there cannot be a nuisance so slight *as that the party committing it is not to be held criminally liable, though there may be an obstruction so slight as not to create a nuisance. * * *Rex v. Russell* (2), which has been referred to, was overruled in *Rex v. Ward* (3); and in *Reg. v. Randall* (4) WIGHTMAN, J. ruled accordingly.

(LORD CAMPBELL, Ch. J.: Yes, as to the doctrine of disproving a nuisance by mere proof that, though public injury is produced, greater public benefit is produced.)

Reg. v. Betts (5) is rather an authority against the defendant: the jury there found that there was no obstruction: had they found any obstruction, the verdict, as appears from the language of the Judges, would have been entered for the Crown.

Lastly, the verdict was against the weight of evidence. (The argument as to this is omitted.)

LORD CAMPBELL, Ch. J.:

[*950]

I am of opinion that this rule should be discharged. I am not called on to give any positive opinion as to the direction: probably it could not be said to be a misdirection, though I think the expression is not felicitous. Nor need I decide whether the verdict be contrary or according to the evidence. *The ground of my decision is, that this is a criminal proceeding, and that the defendant ought not to be twice put in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred. I, for my own part, reprobate the recent speculations

(1) 45 R. R. 426 (6 Ad. & El. 143).

(4) Car. & M. 496.

(2) 30 R. R. 432 (6 B. & C. 566).

(5) 83 R. R. 813 (16 Q. B. 1022).

(3) 43 R. R. 364 (4 Ad. & El. 384).

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as to the propriety of granting a new trial after acquittals for felony and murder. If there be an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal. When an indictment is instituted purely to raise a question of civil right, I agree with the doctrine which I find established. When there is no serious charge of an offence, it has been customary to interfere by suspending the judgment of acquittal; and I concur with Lord DENMAN and his colleagues (1) in holding that what it has been the practice to do indirectly should, when done, be done directly. But, where a real offence is charged, it would be creating a dangerous precedent to grant a new trial after an acquittal. I do not know where we should stop. A nuisance may be created by exercising an unwholesome trade, by offensive noises, by numerous other means; and one can conceive this going so far as to produce manslaughter or even murder. Here a grave offence is charged: the defendant is accused of having obstructed the navigation: navigation is performed by both ships of war and merchantmen. The offence may be most serious. Then, does the verdict determine a civil right? No; for, after a verdict of Not guilty, there may be to-morrow another indictment preferred by the same party, to which the present acquittal will be no bar. I think, therefore, that this is not within the class of cases in which a new trial ought to be granted after acquittal.

COLERIDGE, J.:

[951]

I am also of opinion that the rule should be discharged, though I do not entirely concur in the reasoning of my Lord: and yet, as he words his opinion, I do not know that I am prepared to differ from it. I rather fear the consequences. From mere necessity, and from the requisitions of justice, the Courts have gradually altered the practice on this point. When a proceeding, though criminal in form, was in substance merely civil, they began with suspending the judgment: and then, I think very rightly (I may say so, though I was myself a party to the decision (1)), the Court said that they would do directly what had been done indirectly. That, I apprehend, was not decided on the ground of any distinction between misdirection and a verdict contrary to evidence; for the Court, according to its former practice, would, I conceive, have suspended the judgment equally in the two cases, and therefore ought equally to grant a new trial in each. And I am not quite

(1) See *ante*, p. 849, note (2).

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sure that the present is not rather a civil than a criminal case ; and, if our judgment were to turn exclusively upon that point, I might reluctantly feel myself obliged to differ from my Lord. But it is quite consistent with holding this proceeding to be criminal only in form, to hold also that in such a case we ought to be more careful how we set aside a verdict than in the case of a proceeding civil in form as well as substance. The Court ought to keep in view the considerations which my Lord has pointed out, and to act with more strictness. We therefore ought not, in such a case, to grant a new trial for misdirection, unless we are sure that the direction was not only inaccurate but *was also so understood by the jury as to lead them to apply a wrong test. And so as to the evidence : we shall grant the new trial if the verdict is perverse, but not if the evidence is merely conflicting. Here, if we were tied to the actual words, I should find it difficult to sustain the direction : and I should be sorry to have it thought that a man may legally commit a small offence. But, if we find that the word “ nuisance ” is so used as merely to import an obstruction, great or small, I should not, on account of the inaccuracy of the expression, grant a new trial. And I think it might be so understood here. Then, as to the evidence, *Mr. Morgan* has pointed out strong grounds for questioning the result : but all was before the jury. In substance, the verdict is : We cannot say that something has not been done which makes a stoppage in the water ; but it is so minute as not to be a practical obstruction, or appreciably disturb the navigation. If you do not so understand the charge and the verdict, you make the Judge’s language incorrect, and the verdict so absurd, that the Judge must have interposed and have told the jury that this was not what he asked. You must suppose that this was what he meant and they understood.

ERLE, J. :

I have nothing to add beyond saying that I am of opinion there is not sufficient ground shown for granting a new trial.

CROMPTON, J. :

I am of the same opinion. In the first place, I am not at all sure that the case is brought within the limits within which the Court grants new trials. The general rule is, that they will not do so after an acquittal. This rule has been infringed in *some few cases of non-feazance and of civil liability ; but we should not be hasty in extending this exception where another indictment may be immediately preferred and no right is bound. No doubt

[*953]

an be entertained of the power of the Court to interfere: and, had there been a verdict here warranting a judgment of prostration, very good ground might be shown for interfering. But here it is an acquittal. I do not know where we should stop: it is very undesirable to extend the practice. In this particular case, it would be very wrong of us to interfere. No doubt it is desirable that the law should not be understood to be as *Mr. Morgan* understands the Judge to have laid it down: but the absurdity of such a result makes me think that the Judge meant that there must be something more than a mere mathematical nuisance, such as would be produced by a child's building; something amounting to what my brother COLERIDGE calls a practical obstruction. So understood, the summing up was right; on the other understanding it was wrong. The only doubt on my mind was, whether the jury might not have misunderstood the Judge. If they used the words in the sense attributed to them by *Mr. Morgan*, he would have been justified in insisting that the finding was for the Crown. But I agree entirely with Lord TENTERDEN's language in the passage cited from *Rex v. Russell* (1): it is most dangerous to fish out particular words where the material sense distinctly appears from the whole of what is said.

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Rule discharged.

HUGHES v. HUMPHREYS.

(3 El. & Bl. 954—959; S. C. 23 L. J. Q. B. 356; 1 Jur. N. S. 42; 2 W. R. 526; 23 L. T. O. S. 208.)

1851.
June 12.

[In this case it was merely held that the statute 5 & 6 Will. IV. c. 63, abolishing local and customary measures, did not apply to sales by weight. The Act was repealed by the 41 & 42 Vict. c. 49, s. 86, and the decision itself superseded by ss. 3, 19 and 20 of the repealing Act.]

REG. v. INHABITANTS OF EARDISLAND (2).

(3 El. & Bl. 960—969; S. C. 23 L. J. M. C. 145; 18 Jur. 876; 2 W. R. 553; 23 L. T. O. S. 189.)

1854.
June 14.

[960]

Justices having, under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 95, ordered a bill to be preferred at the Assizes against the inhabitants of a parish, for non-repair of a highway, the prosecutor removed the case by *certiorari* into this Court; and it was tried on the *Nisi Prius* side at the Assizes; and a verdict was given for the Crown:

Held that the prosecutor was entitled to costs, though the proviso in the section speaks only of removal by a defendant.

And that a Judge's order, directing the costs to be paid out of "the rate

- (1) 30 R. R. 432 (6 B. & C. 603). (1868) L. R. 3 Q. B. 216, 37 L. J.
(2) Dissented from: *Reg. v. Ipstones* M. C. 37, 17 L. T. 497.

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made and levied" in the parish according to the statute, was not for that reason bad.

The order did not name the amount of costs: Held, on motion to set the order aside, that it was nevertheless good.

A side Bar rule was obtained for the coroner and attorney of this Court to tax the amount: Held proper, by Lord CAMPBELL, Ch. J., and ERLE, J., *disentente* CROMPTON, J.

THIS was an indictment preferred against the inhabitants of the parish of Eardisland in Herefordshire, under stat. 5 & 6 Will. IV. c. 50, s. 95. The bill was found at the Herefordshire Assizes: and the prosecutor removed the indictment into this Court by *certiorari*; and the case was tried on the *Nisi Prius* side, at the last Herefordshire Assizes, before Wightman, J.; when a verdict was found for the Crown. The learned Judge indorsed upon the *Nisi Prius* record an order: "that the costs of this prosecution be paid out of the rate made and levied in the parish of Eardisland in pursuance of the statute 5 & 6 Will. IV. c. 50." In last Term a side Bar rule was made, that it should be referred to the coroner and attorney of this Court to tax the said costs.

Whateley moved for a rule to show cause why the order of the Judge and the side Bar rule should not be set aside:

[*961] First, the Judge had no power to make this order. Sect. 95, under which it is supposed to be made, authorizes *defendants only to remove by *certiorari*: here the removal was by the prosecutor.

(COLERIDGE, J.: The clause authorizing a defendant to remove may have been considered necessary in consequence of the *certiorari* having been taken away (1): but the Crown would not be within the prohibition.)

The prosecutor therefore removes at common law, and cannot have the statutable costs.

(COLERIDGE, J. referred to *Reg. v. Pembridge* (2).)

That was a case where the Judge certified that the defence was frivolous, under sect. 98.

Secondly, the order of the Judge is bad, for not naming the amount of the costs: *Reg. v. Clark* (3), *Reg. v. Watford* (4).

Thirdly, the order directs the costs to be paid out of "the rate

(1) Sect. 107. See *Reg. v. Sandon*, ante, p. 643.

(2) 61 R. R. 433 3 Q. B. 901).

(3) 64 R. R. 678 (5 Q. B. 887).

(4) 75 R. R. 887 (4 Dowl. & L. 593).

made and levied in the parish:” there may have been no such rate: the order should be for payment out of a rate to be made; that must have been the meaning of this section.

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COLERIDGE, J. :

That fault, if it be one, will do you no harm. There is nothing in your first and third points: on the second you may take a rule *nisi*.

ERLE and CROMPTON, JJ. concurred.

(No fourth Judge was present.)

Rule nisi accordingly.

Keating and J. Gray now showed cause :

Reg. v. Clark (1) is inapplicable. There the indictment was *preferred at the Assizes in the first instance, and tried by the Judge sitting on the criminal side. The Judge there sits in banc; and what he, when acting as a court of *oyer and terminer*, does not do cannot be done at all. In that case, too, the commission of the Judge had expired, and the Court had ceased to exist for nearly two years before the application. The order of the Judge here is no more uncertain than an award which directs the costs to be paid by one of the parties, but leaves it to the officer of the Court to tax the amount.

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(LORD CAMPBELL, Ch. J.: The officer of the Court of Quarter Sessions taxes, where they order costs.

CROMPTON, J.: In 2 Nol. P. L. 574 (4th ed.) it is said: “where the Court of Quarter Sessions gives costs to the party appealing against a rate, it should ascertain the precise amount, for if their order directs, that ‘the costs of the appeal shall be taxed by the clerk of the peace,’ it is bad as to that particular.”)

That Court is in the same position as the Judge of *oyer and terminer*. But when the case is tried at *Nisi Prius*, having been removed into this Court, the ordinary rules of *Nisi Prius* cases are applicable. The Judge at *Nisi Prius* has no taxing officer. In *Reg. v. Watford* (2) the order was held bad for not specifying the fund from which the payment was to be made. The function of the Judge who tries the case is, to see that the case falls within sect. 95, whether the road

(1) 64 R. R. 678 (5 Q. B. 887).

(2) 75 R. R. 887 (4 Dowl. & L. 593).

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is really a highway, whether the prosecution has been ordered by justices, and the like. He is then to order that costs be paid by the defendant.

[*963] (LORD CAMPBELL, Ch. J. : That may perhaps be all that the actual words of the section require : but the authorities show *that, in at least some cases, the Judge has to do more.)

Not where the trial is at Nisi Prius.

(LORD CAMPBELL, Ch. J. : *Reg. v. Clark* (1) was certainly not a case at Nisi Prius ; but *Reg. v. Watford* (2) was. But the Master of the Crown Office, Mr. Robinson, informs us that the practice has been in conformity with what has been done here.)

Whateley and Skinner, contra :

Sect. 95 confers a very special power on the Judge. It is admitted, on the other side, that the amount must be ascertained both by the Court of Quarter Sessions and by the Judge of *oyer* and *terminer*.

(ERLE, J. : The 95th section contemplates three tribunals : first, the Judge of *oyer* and *terminer* (improperly called Judge of Assize) ; secondly, the Quarter Sessions ; thirdly, by the proviso, this Court, upon a removal from Quarter Sessions by the defendants.

CROMPTON, J. : The effect of the proviso rather seems to me to be to put the Judge at Nisi Prius, in this respect, on a footing with the Judge of *oyer* and *terminer* : I do not think it has any thing to do with this Court, so far as the costs are concerned.)

Each of the three tribunals has the same means of taxing the amount. It is said that the Judge has no taxing officer : why should he not employ the clerk of Assize to tax ? *Reg. v. Clark* (1) is in point.

(LORD CAMPBELL, Ch. J. : That case shows only that a *mandamus* would not issue to command the payment of a sum not ascertained.)

PATTESON, J. there says : “ when the Legislature says that the Judge shall direct the costs to be paid, the meaning must be that he should ascertain the amount, either by himself, or his officer, *or some one

(1) 64 R. R. 678 (5 Q. B. 887).

(2) 75 R. R. 887 (4 Dowl. & L. 593).

whose advice he may take." *Reg. v. Watford* (1) is also an authority in favour of the rule, though not a very strong one; for the objection which there most weighed with the Judge was not that now insisted upon. The order for costs, when made, is the order of the Judge, not of this Court. The question is whether the order, as it stands, is good or bad: and it is bad for its generality, and cannot be aided by an act of this Court in banc.

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LORD CAMPBELL, Ch. J.:

I am of opinion that this rule should be discharged. It seeks to disturb a practice which, as our officer certifies to us, is the usual practice, and which is certainly a most convenient one. It is clear that justice may be done in this way better than in the way suggested by the party impugning it. Still we must alter the practice, if we are bound to do so by the words of the statute. But I think we are not so bound. The order of the Judge follows the statute *ipsisimis verbis*, and is unimpeachable, whether what has been done by the side Bar rule be right or wrong. But I think that the side Bar rule is right, and that the costs ought to be taxed by the officer, who should include the costs which have been incurred subsequently to the Assizes. The record is brought here by *certiorari*, and has become a record of the Court of Queen's Bench. We are to give our judgment upon it, and are invested with power to estimate the amount of costs. My brother ERLE has shown that the 95th section contemplates three tribunals, the Sessions, the Court of *oyer and terminer*, and the Judge who at *Nisi Prius* tries the cases on the record of this Court. This is the *third case: and, upon a fair interpretation of the Act, the Judge at *Nisi Prius* is to make an order which is to be carried into effect by our officer ascertaining the amount of costs down to the time at which the last costs are incurred. I cannot find that in so deciding I am acting against the authority of any case. I approve of the decision in *Reg. v. Clark* (2): no *mandamus* can go commanding the payment of an indefinite sum. *Reg. v. Watford* (1) was decided on the ground that the order was bad for not ascertaining the fund from which the payment was to be made; and on that ground alone.

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ERLE, J.:

I also am of opinion that the rule should be discharged. The 95th section in the first place provides two tribunals. One of these

(1) 75 R. R. 887 (4 Dowl. & L. 593). (2) 64 R. R. 678 (5 Q. B. 887).

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is called "the next Assizes;" and afterwards the words are "the Judge of Assize before whom the said indictment is tried:" but the Judge who tries an indictment sits, not under a commission of Assize, but under a commission of *oyer* and *terminer*; so the Court of *oyer* and *terminer* must be the tribunal meant. The other is the Court of Quarter Sessions. In these two cases, it has been held that the order for payment of costs must specify the amount. This is a third tribunal, contemplated in the proviso at the end of the section; and the Judge has here not specified the amount. So that the question is, whether there be a distinction in this respect between the two tribunals first named and that contemplated under the proviso authorizing a removal to this Court. Now there is good reason why the Commissioner of **oyer* and *terminer* who tries the case, or the Quarter Sessions, should fix the amount. In each of these two cases the tribunal which tries has full power finally to dispose of the case. On judgment being there pronounced, the record has finished its office and the prosecution is at an end. With reason, therefore, those tribunals are entrusted with the duty of ascertaining the amount, and cannot hand this duty over to an inferior officer. It is not supposed that the Judge or Quarter Sessions ascertain the amount themselves: they adopt the act of their officer; but this makes it requisite that the adoption should take place before their duty is at an end. But is this reasoning applicable to a case removed by *certiorari*? Suppose the case were tried at Bar; there is there no Judge of Assize; yet the costs could be given and estimated; for I presume it will not be contended that a party, by removing to this Court, loses his right to costs. Now, when a trial is at Bar, our officer is ordered to tax the costs. Then also, by the course of practice in the case of trials at Nisi Prius, the Court orders its officer to tax; the practice in this respect does not differ, whether the trial be at Nisi Prius or at Bar. But it is said that the Judge at Nisi Prius is in the same position as what is called "the Judge of Assize," meaning the Judge of *oyer* and *terminer*. That, I think, is wrong. The Judge at Nisi Prius tries for this Court; and the analogy of a trial at Bar applies: it is clear that he cannot ascertain the costs; for the record must be returned to the Crown Office, so that all the costs do not fall under the notice of the Judge at Nisi Prius. If, in any case, he can ascertain them all, still I see nothing to show that he must; and I think the ordinary practice may prevail, and that he may adopt **sub silentio* the act of the officer. The trial at Nisi Prius takes place subject

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to the contingency of a new trial being ordered by this Court, in which case the order of the Judge would fall to the ground. It seems to me that the prosecutor has here followed the right course.

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CROMPTON, J. :

I agree that there is no reason for setting aside the Judge's order, which may be the foundation for a subsequent order. But I think that, under this proceeding, the prosecutor cannot get his costs, and that some further step is wanted. But, as at present advised, I do not think this the proper mode for obtaining these costs. I think this Court has nothing to do with the matter. Upon the decisions, it seems clear that the Judge who tries is to settle the amount. The effect of the side Bar rule is to delegate the authority of this Court to its officer; and, after he has taxed, if the amount is not paid, an attachment may go: so that the Judge who orders the payment really does nothing as to the amount. Now, according to the very words of Mr. Justice PATTESON, which have been cited, "when the Legislature says that the Judge shall order the costs to be paid, the meaning must be that he shall ascertain the amount either by himself, or his officer, or some one whose advice he may take" (1). But by the proposed proceeding we shall take this away from the Judge. It seems to me that the party who tries is the party ultimately to say what is to be paid. It is admitted that this is so when the trial is at Quarter Sessions or before a Judge of *oyer and terminer*. Suppose the Judge at Nisi Prius is not a member of this Court: if we direct *our officer to ascertain the amount, we withdraw the question of amount entirely from the Judge. It is not contended that the Judge at Nisi Prius cannot fix the amount: and suppose he chooses to do so, by getting assistance, and giving the sanction of his name to the ascertained amount: can we say that he is wrong? The Judge may not agree to the amount which the officer fixes: but we are taking from him the power of exercising his judgment on the amount, which it seems clear to me that he ought to have. I think, therefore, that we have nothing to do with the matter, and that the side Bar rule is wrong. A difficulty is suggested, that costs may be incurred in respect of what takes place after the Assizes. I do not see the difficulty: the Judge need not ascertain the amount while he is sitting at Nisi Prius, but may do so after all the proceedings are brought to an end. It is said that the 95th

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(1) 64 R. R. 683 (5 Q. B. 894).

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section contemplates three tribunals. I think that makes no difference. The proviso at the end of the section enables a defendant to remove from the Quarter Sessions: a little while ago there was a doubt whether he could remove from the Assizes; but the doubt did not prevail (1). But I think the effect of the proviso is only to put the Judge at Nisi Prius into the position of the Judge of *oyer* and *terminer*. To grant this side Bar rule is as much as to say that this Court could order the payment of the costs. But we cannot say whether the requisites of the section were complied with, as, for instance, whether the liability was in dispute. It seems to me, therefore, that this course, though a convenient one, is not the proper one. If the question were new, I should be more ready to put a liberal interpretation on the section.

[969] LORD CAMPBELL, Ch. J., added :

I wish to say (not by way of reply to my brother CROMPTON, but by way of explanation) that I think the Judge after granting the order at Nisi Prius is *functus officio*; and I think that he is to grant the order in this form; and then the only mode of carrying it out is by a side Bar rule.

CROMPTON, J. :

The Judge who tried the case will then have no opportunity of dissenting from the taxation of the officer of this Court.

(No fourth Judge was present.)

Rule discharged.

1854.
June 15.

VIDI v. SMITH.

(3 El. & Bl. 969—976; S. C. 2 C. L. R. 1573; 23 L. J. Q. B. 342; 1 Jur. N. S. 14.)

[This case, as to accounts and inspection under the Patent Law Amendment Act, 1852 (repealed by 46 & 47 Vict. c. 57, s. 113), was rendered obsolete by sect. 30 of the repealing Act, now replaced by s. 34 of the Patents and Designs Act, 1907, and the R. S. C., Order XXXI., r. 12; Order L., r. 3; Order XV., r. 1.]

1854.
June 15.

HOLLAND v. FOX.

(3 El. & Bl. 977—986; S. C. 23 L. J. Q. B. 357; 1 Jur. N. S. 13; 2 W. R. 166.)

[This was also a case under the repealed Patent Law Amendment Act, 1852, and was rendered obsolete by 46 & 47 Vict. c. 57, s. 30, now replaced by s. 34 of the Patents and Designs Act, 1907, and R. S. C., Order XV., r. 1.]

(1) *Reg. v. Sandon*, ante, p. 643.

JUDKINS *v.* ATHERTON.

1854.
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(3 EL. & BL. 987—989; S. C. 23 L. J. Q. B. 335; 18 Jur. 813; 2 W. R. 563.)

[This case only dealt with the question of time for notice of trial under the Common Law Procedure Act, 1852, and is superseded by the R. S. C., Order XXXVI., rr. 11 and 12.]

REG. *v.* WORTHING ROAD TRUSTEES.

1854.
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(3 EL. & BL. 989—1009; S. C. 2 C. L. R. 1678; 23 L. J. M. C. 187; 18 Jur. '907; 2 W. R. 478.)

[The only questions in this case were as to the construction and effect of the statute 4 & 5 Vict. c. 59, now expired, and the Public Health Act, 1848 (repealed by the Public Health Act, 1875, s. 343). The case is of no importance in the present day.]

CHANCERY.

IN RE BENNETT'S ESTATE.

(18 Jurist, 33; S. C. 2 Eq. R. 4.)

1854.
Jan. 13.
KINDERSLEY,
V.-C.
[18 Jur. 33]

Where a deed is to be settled by the Court, it is sent to the Judge's chambers, and from the Judge's chambers it is sent to the conveyancing counsel.

KINDERSLEY, V.-C. :

Under the old practice, sending matters to counsel was not the rule at all. The Master was supposed to settle himself every conveyance. But the practice arose of the Master saying, "If you have it settled by counsel, who are familiar with the details of these matters, it is much better, where the parties do not dispute it; but if the parties dispute it, then dispute it before me." But now the Legislature has established these counsel as a reference in the first instance. However, these matters always go through chambers, and the form of the order is, that the conveyance is sent to chambers, and from chambers it goes to the conveyancing counsel.

HOFFMAN v. DUNCAN.

(18 Jurist, 69.)

1853.
Nov. 2.
WOOD, V.-C.
[69]

A retired partner, who had advanced all the capital, and was liable to the partnership debts, appointed receiver of the partnership assets on his own application.

FOOKS, for the motion, stated that the plaintiff had formerly been partner with the defendant, who was now in insolvent circumstances: that though the partnership had been duly dissolved, the defendant had recently, in negotiating bills of exchange, used the style of the old firm, in which the plaintiff's name appeared, and applied the money to his own purposes: that the plaintiff had advanced all the capital, and was now liable for, and would have to satisfy, all the debts of the concern, the partnership assets being insufficient. The plaintiff was ready to act without salary.

SIR W. P. WOOD, V.-C. :

I see no objection, the whole property being in fact his own, according to the affidavit, which is not contradicted.

IN RE THE MARYLEBONE BANK.

(18 Jurist, 281—282; S. C. 2 Eq. R. 364.)

1854.
Feb. 23, 24.KINDERSLEY,
V.-C.

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Unless debts are actually established against the estate, the Master cannot make a call for payment of debts.

The Master cannot make a call for payment of costs, charges, and expenses, including remuneration of the official manager, unless it is shown what is the amount of the costs, charges, expenses, and remuneration, and unless it is shown from what persons payment is likely to be obtained.

AN order having been made for winding up the affairs of the borough of St. Marylebone Joint-stock Banking Company, the Master proceeded to settle the list of contributories, which included persons holding 3,656 shares. The official managers, H. M. Kemshead and R. P. Harding, made an affidavit before the Master that claims against the Company had been made to the amount of 30,112*l.*, of which 24,000*l.* was claimed by Mr. E. Walker, one of the directors; and the only other claimant, not a director, was a Scotch Banking Company: that they believed that the holders of a large number of shares would be unable to pay any part of any call which might be made upon them, and that after allowing for the same, it would be impossible to realise the sum above mentioned by any less call than 30*l.* per share: that the costs of and incidental to the petition, and of the subsequent proceedings in and about the winding up of the Company, were estimated at 2,500*l.*, being unpaid, and that there were no assets, and it would be necessary to provide 3,000*l.* for that purpose, and that it would be impossible to realise the said sum of 3,000*l.* by a less call than 4*l.* per share. The solicitor to the official managers also made an affidavit that great expense and delay had been occasioned by examining the claim of Mr. E. Walker: that the solicitor had drafted his bill of costs, which amounted to 1,800*l.* and upwards: that it would be necessary to provide a fund to cover the expenses of defending claims: that he had received from the official managers, in respect of costs, 550*l.*, and no more. Upon this the Master made orders for a call of 30*l.* per share and for a call of 4*l.* per share on all the contributories. Lord Harrington, one of the contributories, now moved that these orders should be discharged.

Glasse and Southgate, for Lord Harrington.

Roxburgh, for the official managers.

Swanston, Sir W. Riddell, Bagshawe and Cole, for other parties.

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SIR R. T. KINDERSLEY, V.-C. :

Now, as to making a call of 30*l.* a share, no one can entertain the smallest doubt that it is impossible to maintain it. It appears to me clear, upon the whole scope of the Act of Parliament, that the persons who are contributories are to contribute towards debts and liabilities, not towards providing a fund which may or may not be applicable. It appears that the amount of claims is 34,000*l.*—claims brought in, not established. I must assume that there is no *constat* of 5*l.* out of the 34,000*l.* having been established, and I have no means of forming a judgment that any part of these debts will be allowed. If I were to conjecture that some would be allowed, I cannot tell whether one-half, or one-fourth, or what portion will be allowed. It appears to me that on this there can be no doubt—you are not to make a call to provide a sum to abide the result of the investigation, and when the liabilities are paid, to hand back the balance; but the object is to provide a fund for payment of what is actually proved. I do not, however, mean to lay down this rule, that you must establish an exact amount to be raised; but that, in order to justify a call to pay creditors, there must appear as a debt due to such creditors a certain sum of money before anybody can be called upon to pay. Now, in this case all the persons whose claims are established, with the single exception of a Bank, are partners in the concern—that is to say, are contributories; and as to some of them, they are not only contributories, but are, or were, directors of the concern. But it is said that it would be very expedient to make this call with this object, that if you make this call, one of the persons on whom it is made will be Mr. Walker, and when he is called to pay 30*l.* upon each of his shares, he will then say he is a creditor for 24,000*l.* Then it is said, when he sets up that claim, “then we shall set up a counter claim, founded upon mismanagement of the directors, and have the matter settled.” But another may say, “I, A. B., am a contributory, because I held fifty shares. I was not a director, and I was not one of those who are said to be responsible; and am I to pay upon my fifty shares 30*l.* a share, not to pay any debt, but as a convenient mode of raising a question, because another person (Mr. Walker) will be liable to pay a similar sum?” It is obvious that the contributories never can be called upon to contribute because it will be a convenient mode of raising the question. It might be convenient if the call was only on Mr. Walker, but not as to the others; but the real truth is, I do not see the smallest difficulty in Walker doing

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what he was doing. He says, "I insist upon it that this Company owes me for money advanced, or for some reason, 24,000*l.*, and I proceed to establish that right." But though you cannot establish what is due till you have ascertained the liabilities between the parties, yet you may ascertain that he is or is not to have credit for 24,000*l.* I do not accede to the argument that the general contributories are to keep hanging back the claim which they say they mean at some day to bring forward against the directors, and I see no difficulty in their bringing forward that case, though Walker should never bring forward his claim. If there had been any conclusion that there was an aggregate of allowed debts to the amount of 24,000*l.*, I am not prepared to say that the Master would not be justified in making a call, when the parties who say they have counter claims have not thought fit to bring forward that counter claim. But there cannot be a call made to pay, nor a debt allowed, but to provide a fund in order that there may be a sufficient sum if such a claim should be allowed. Now, Mr. Walker's claim never was a claim, in the proper sense of the term; and what is the meaning of admitting a claim? Why, that after investigation, and after, at least, *primi facie* evidence to show that such an amount is due, the principal use of admitting a matter as a claim really is this—that if a division be made, you may reserve enough to answer that claim; but that can never be done as to a mere claim brought in, and never attempted to be prosecuted. My opinion is, that the order which directs a call of 30*l.* cannot be maintained, and must be discharged. The other order stands in a very different situation, for that is not to provide a fund for something which may hereafter be established. My notion of the jurisdiction of the Master as to payment of costs and expenses, including what may be allowed to the official manager, is this—that *prima facie* the Master would not allow anything beforehand to the official manager as his remuneration, or to the solicitor of the official manager, unless a case, I do not mean a very special case, were made, but a case, for instance, which would last many *years. But then the Master should do this—he should determine what remuneration the official manager should have; and if it is proposed to make a call to pay the remuneration, he ought not to do so unless he has come to some conclusion as to the amount which the manager is to have for salary, or as to the amount which, whatever may be the result, the official manager is entitled to. I think, that before the Master can make a call for that purpose, he

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should have come to some conclusion that some sum ought to be paid. As to raising money to pay the costs of the solicitor, I will not say, as a fixed rule, that the solicitor should have brought in his bill of costs, but that at all events it ought to be propounded to the Master, whether, although the matter has not been concluded, there has not been such an amount of service rendered as that he should be entitled to some amount of costs. If the Master comes to the conclusion that the solicitor must be entitled to some sum, it is not necessary that there should be a bill of costs; but *prima facie* I should say, "Bring in a bill of costs, that I may judge what is to be the sum to be paid on account." I should require that, but I do not lay it down as a rule. Now, these two matters which I mention—the claim for remuneration and costs—constitute the great bulk of the 2,500*l.* which it was proposed to raise for payment of costs and expenses; and besides the costs actually incurred, it was considered that 500*l.* ought to be raised for future costs. Now, having stated what I think the Master should have done, the question is, whether the Master had that brought before him. I have no doubt but that, to the extent to which it was brought before him, he exercised a discretion, and perhaps a sound discretion; but when we look at the course of proceeding—that the affidavits on which he proceeded were not filed till that very day, though copies had been handed to the counsel of the opposing parties, and that no schedule was appended until it was before the Master—and if the Master had been in possession of the case as I now have it, the conclusion at which he arrived would have been different—I do not think he would have come to the conclusion that 4*l.* per share ought not to be raised, or that it ought, but he would have said, "Before I raise the 3,000*l.* I must have something more than this to show, that when I have enforced this call, I shall know what to do with it. What am I to do with it? Am I to pay 1,200*l.* upon a mere statement of what they estimate as their costs, and 1,000*l.* for remuneration, before I know whether the official manager is to receive any remuneration? I have no data to enable me to come to a conclusion about it." Besides which, the Master, in order to raise 30,000*l.*, made a call of three times as much as would raise it; but to raise the sum of 3,000*l.*, he made a call calculated to raise six times as much. Now, how to reconcile this I am at a loss; yet I feel myself in doubt whether, to produce this money, it can require 4*l.* per share. The Master ought to have regard to the persons from whom he expects to obtain the money, some being bankrupt, insolvent,

and so forth. I do not come to the determination that there may not properly be a call made, or that 4*l.* per share ought not to be raised. Therefore I do not discharge this order, but refer it for the Master to review his decision, without prejudice to his making such call or calls as he thinks fit. I determine nothing against the call, except that he ought to have had better data.

His Honour then said that he could not make any distinction as to Lord Harrington's case; and after some discussion, the following order was made: Discharge the order, without prejudice to the Master making such a call for costs, charges, and expenses as he may think fit. All parties to have their costs.

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MARYLE-
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IN RE HARDY'S ESTATE.

(18 Jurist, 370—371.)

1854.
April 27.

A petition for the investment of money paid into Court by a Company was made by the tenant for life, but the investment was not approved of by the Court. The Company received their costs out of the fund. No order was made as to the petitioner's costs.

KINDERSLEY,
V.-C.
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IN this case the tenant for life of a fund in Court, arising from the sale of land to the Sheffield Junction Railway Company, had presented a petition for the investment of the fund in the purchase of other lands. A reference had been made to his Honour's chief clerk as to the propriety of the investment, the result of which was, that the proposed investment was not approved of; and the question now to be determined was, how the costs of these proceedings were to be borne.

Fooks, for the petitioner.

Humphreys, for the Company.

In re Woolley (1) and *Ex parte Stevens* (2), were cited.

Sir R. T. KINDERSLEY, V.-C., said he thought the two cases cited were quite consistent, and that the rule laid down by Lord CRANWORTH in *Ex parte Stevens* was perfectly correct, namely, that if a party proposed an investment which was proper and unobjectionable, the Company must pay the costs; but that if the property *proposed to be purchased was not such as the Court would approve, as not being adequate for the purposes of the trust, it was doubtful whether the Company could be required to pay the costs. Indeed, the question was, whether the Court ought not to compel him to pay the costs

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(1) 17 Jur. 850.

(2) 15 Jur. 243.

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of the Company. His Honour ultimately directed the costs of the Company to be paid out of the fund in Court. The petition would not stand dismissed in terms, and no order would be made further than that the Company should have their costs.

1854.
March 9.

WOOD, V.-C.

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THE EARL OF SHREWSBURY v. THE COUNTESS OF SHREWSBURY.

(18 Jurist, 397—399; S. C. 23 L. T. O. S. 86.)

The S. estates were by Act of Parliament vested in trustees upon trust to sell, with the consent of the Earl, the tenant for life in possession, and to invest the sales monies in the purchase of other lands convenient to be held with the bulk of the property. Under these trusts certain outlying portions of the estates were, by a contract between the trustees, the Earl, and P., contracted to be sold to P. for 29,000*l.*, and 5,000*l.* was paid by P. to the Earl as deposit, to be paid by him to the trustees when a proper purchase should be fixed upon in which to re-invest the sales monies according to the trust. The purchase was never completed, and the 5,000*l.* thus left in the Earl's hands was forfeited, and the same lands were, some years afterwards, sold for 22,000*l.*: Held, that the 5,000*l.* belonged to the settled estates, and not to the Earl absolutely.

The Earl had bought, in his own name, for 18,000*l.*, the C. H. estate, which was convenient to be held with the bulk of the S. estates, and with the view of offering it to the trustees. In order to raise the purchase money the Earl immediately mortgaged it to nearly the full amount of 18,000*l.*, and after having made some alterations in it to suit his own purposes, he offered the same to the trustees for 16,350*l.* The trustees agreed to the proposition, and a joint petition was presented to the Court, praying a reference to inquire into the title, and whether it was a fit and proper purchase, and an order was made in the terms of the prayer. Before any other step was taken the Earl died. The agreement by the trustees to purchase the C. H. estate was not signed by the trustees, but rested on some letters written by the Earl to his solicitors, and by them to the Earl, the solicitors being also solicitors to the trustees: Held, that the C. H. estate was part of the Earl's estate, *and not part of the settled estates, there being no binding contract entered into by the Earl capable of being enforced against his real representative.

Quere, what would have been the result if the order had not stopped at directing the inquiries, but had proceeded to order the completion of the sale, in case of the inquiries as to fitness and title being satisfactory?

THE questions in this case were two—first, as to the right of the plaintiff to a sum of 5,000*l.*, a forfeited deposit on an attempted sale; and in the next place, whether an estate, called Cotton Hall, which had been purchased by the late Earl, was included in certain property which was by the late Earl's will to be offered to his heir at a given price of 25,000*l.* The material circumstances were as follow: The Shrewsbury estates were settled under an Act of Parliament of the reign of Henry VII., in tail, not capable of being

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barred by fine or recovery. Various private Acts of Parliament (the latest bearing date 1843) have been since obtained, enabling sales of certain portions of the estates, the monies to be invested in other lands more eligible, to be held together with the bulk of the settled lands, and to be settled upon the old uses; and with this view the portions of the family hereditaments intended to be sold were vested in trustees, who were empowered to sell, with the consent of the Earl. An outlying portion of the estate was accordingly offered for sale on the 7th May, 1845, when a Mr. Potter was declared the purchaser at 29,000*l*. By agreement of that date, made between the late Earl of the first part, the trustees for sale of the second part, and Potter of the third part, in consideration of 5,000*l*. paid to the Earl by Potter, and which the Earl agreed to apply in manner therein mentioned upon payment of the residue of the purchase money, the portions of the estates therein particularly described were contracted to be sold to Potter for 29,000*l*. The sale never was completed, Potter being unable to fulfil his part of the contract, which was accordingly declared at an end, and the deposit of 5,000*l*. in the hands of the Earl forfeited; and the lands so contracted to be sold to Potter were afterwards sold for 22,000*l*. The question was, who was entitled to the 5,000*l*., whether it belonged to the late Earl absolutely, or as part of the settled estates. The second question arose thus: The late Earl had in his lifetime purchased on his own account, and in his own name, an estate called "The Cotton Hall Estate," for 18,000*l*. The contract was completed in his own name, and the purchase money paid. The Earl mortgaged it immediately afterwards for nearly the amount of the purchase money, which debt still continued to be owing at the time of his decease. But the late Earl having purchased the Cotton Hall estate, as was apparent, and admitted on all sides, with the view of offering it to the trustees of the settled estates, did so offer it immediately after the conveyance to himself. The contract was never signed by the trustees, and rested in certain letters by the Earl to his solicitors, who were also solicitors to the trustees, and from the solicitors to him. The late Earl, having for his own purposes made some alterations in the premises, offered them to the trustees for 16,350*l*., of which it was ultimately agreed that he should receive 2,500*l*., and the remainder go to the mortgagees. A petition was accordingly presented by the Earl and the trustees, stating these facts, and praying a reference for an inquiry into the fitness of the purchase, and as to title. An order was made in the terms of the prayer;

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but before any further steps the Earl died, leaving considerable property, apart from the settled estates. By his will he directed, in general terms, that all his own real estate, and all certain other enumerated articles of furniture and objects of art, should be offered, in the first place, to the person who should succeed him as Earl of Shrewsbury, at the sum of 50,000*l.*; and if he did not accept, then to be sold, and the produce to fall into his general residuary estate. The direction was evidently intended to be beneficial to the successor. By a codicil dated in June, 1845, the testator reduced the price to be paid by his successor from 50,000*l.* to 25,000*l.* The property included in it, even without the Cotton Hall estate, was worth more than 25,000*l.* The trustees appeared never to have interfered in selecting any lands as proper to be bought or sold, but that was left entirely to the discretion (subject to approval by the Court) of the Earl and the solicitors in question. It was admitted that the discretion had in all cases been judiciously exercised.

Bagshawe, for the Earl, claimed the Cotton Hall estate, as being the property of the late Earl, and included in the items which he, the present Earl, was to have for 25,000*l.*; and insisted also that the 5,000*l.* forfeited deposit money did not belong to the late Earl, but still continued to form part of the settled estates.

Rolt and Dickinson, for the executors of the late Earl.

Heming, for the trustees of the settlement under the Act.

Bagshawe, in reply.

SIR W. P. WOOD, V.-C.:

The question is, whether the late Earl was bound by the contract which he left unfinished at his decease. If he were bound, but the trustees not bound, there might still be a contract which they would be entitled to have carried out, whatever the heir or the executors might say. But the real doubt here is, whether the Earl himself was bound, under the peculiar circumstances of this case. I must try it as if there were a bill filed against the heir of the late Earl to carry the contract into effect. The solicitors, Messrs. Eyston, appear to have been trusted both by the Earl and the trustees; but I cannot say that in this treaty they were agents of the trustees in such a sense as that their signature would bind the trustees. The only statement is, that they acted as solicitors only in the purchase.

Now, the authority of a solicitor is not enough to bind a purchaser. But even assuming them to have had authority to have purchased from a stranger, what would be the effect of a correspondence carried on between them and the Earl and a stranger, they filling three capacities—solicitors for the trustees, and for the Earl, and for the estate? Lord Shrewsbury bought this estate, I have no doubt, with the very object of selling it again to the settled estates. He writes this letter, in which he says the time is coming on for the purchase of the Cotton Hall property; and then follow some differences of opinion as to the balance which should come to the Earl out of the purchase money. He agrees, however, ultimately to take 2,500*l*. In some sense all this looks as if he were treating the solicitors as agents of the purchasers; he does not tell them to complete on such and such terms, but that such and such are the terms which he will accept. They then write, in answer, showing where they differ from his Lordship as to the items which would have to be deducted, and that the balance was only 2,587*l*. 10*s*., and that if their view be acceded to, the purchase can be carried out. No doubt, if they had been the fully-authorized agents of the purchaser, and the purchaser had been a stranger, that would have been enough; but here they fill a double capacity. The words of the Act of Parliament are, that the trustees are to invest the purchase monies under the direction of this Court. If the Earl had agreed to sell in this form, "I agree to sell if the Court shall approve," then his heir would have been bound if the Court approved of the purchase. But here I do not think it is quite so high as that. All that it amounts to is this—there is a sort of treaty, with a difference of opinion as to what is the best way of dealing with the proposed purchase money. Now, the proceedings on a purchase by the trustees under the Act of Parliament would of course be, to present a petition, stating the desire of all parties to complete this purchase. Until some definite *order of the Court is made upon that, I cannot say that any of the parties are bound. It would have been a different question, which does not arise here, what would have been the effect of an order made in the form now usual, viz., an order directing an inquiry as to the title, and of the advantageousness of the purchase, and, if approved of, then ordering the contract to be carried out. Here there is nothing of the kind. The order was made in the form then usual, following the words of the prayer, for an inquiry whether this would be a proper purchase in which to invest 16,350*l*., and also whether a good title can be made; and

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there it stops short. It still remained for a final order of the Court to complete the bargain; but this is wanting. I cannot, therefore, say that there is a valid contract between the parties. There was then an argument addressed to the Court founded on the intention—the testator intended that his unsettled and not his settled estates should pass by this clause. But the question always remains, what are his real estates which are unsettled? Looking to the will, as far as it is lawful to do so, it appears, that at the time when he clearly thought that the estate was his own in every sense of the word, he made a codicil, by which he diminished from 50,000*l.* to 25,000*l.* the sum to be paid by his successor for the property so directed to be offered to him. It is clear, therefore, that he intended this privilege to be a bounty to his successor, not relative to the value of the property included in the right of pre-emption. As to the other question as to the 5,000*l.*, I have no doubt but that it belongs to, and still forms a part of, the estate in respect of which it was paid. If a tenant for life, whose consent was necessary to the sale, obtains, by being made a party to and entering into the agreement, and taking 5,000*l.*, the dominion over such a sum, he must be held to take it as he does anything else which he acquires under the Act of Parliament, *i.e.* as tenant for life only. He, taking it under the authority of the Act, takes it as a trustee for the purposes of the Act. It is said that he received it, as stated in the agreement, upon the terms to pay the money only when the time should come for investment of the purchase money under the Act; but that that time never came, the purchase having been abandoned; and that the trust estate was, in fact, without reference to this 25,000*l.*, in the same position when the sale was abandoned as if the contract had never been entered into. But by analogy to the cases of renewable leaseholds, and to cases of partnership, and to all cases where a person reaps an advantage in dealing with property arising from his peculiar position in reference to that property and to other persons interested in the same property, the person so deriving any advantage or sum of money will always be held a trustee of what he so obtains, upon the same trusts as the property in reference to which it has been obtained. Therefore declare that the 5,000*l.* forms part of the settled estate, and that the Cotton Hall estate forms part of, and is to be included in, the property to be offered to the present Earl at the price of 25,000*l.*

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(18 Jurist, 508—510; S. C. 23 L. T. O. S. 128; 2 W. R. 407; 2 Eq. R. 888.)

The testator directed his property to be sold, and got in and invested; and as to the residue, after certain previous gifts, during the life of his daughter M., the trustees were to take and pay her, out of the dividends and annual income, an annual sum of 50*l.*; and during the life of his daughter H. the trustees were to take and pay her, out of the dividends, &c., a like yearly sum of 50*l.*; and out of the like income they were to pay to or apply for his granddaughter L. (then an infant) a yearly sum of 50*l.* for her maintenance and education; and then gave other annuities. The testator also empowered his trustees to continue a business in which he was engaged, and gave special directions as to treating profits as income, and capital stock as principal. There was a direction as to abatement of legacies. After the date of his will, the testator entered into new articles of partnership, by which, in the case of his decease, living his partner (which event happened), the latter was to purchase the testator's share in the business at a sum named in the articles, and to be paid in five annual instalments, with interest thereon, (not in the meantime, but each instalment, with its interest, to be paid year by year). The testator died, and the surviving partner took to the whole business on those terms; but four of the instalments were still not due; and the income of the testator's estate not being sufficient to pay the annuities in full: Held,

First, that they must for the present abate *pro tanto*.

Secondly, that the interest on each instalment, when paid, would be considered as income, and applicable to repayment *to the annuitants of the amounts which in the meantime they were called on to abate.

And the annuitant L. having attained twenty-one: Held, that her annuity ceased, maintenance and education being intended only to continue during minority (1).

THE bill in this case was filed by the trustees of the will of James Butler, the testator in the cause, against the annuitants and residuary legatees. It stated the will of the said James Butler, seedsman, dated the 17th July, 1843, and a codicil, dated the 5th January, 1847, whereby, in effect, the testator gave all his real and personal estate, subject to the payment of debts, legacies, &c., to the plaintiffs and Bowers, upon trust to get in and invest the same; and, "during the life of his daughter Hannah," (since deceased), to receive and take, and pay her, out of the dividends, interest, and annual income thereof, 50*l.* annuity, for her separate use; and, "during the life of his daughter Mary," to receive and take, and pay her, out of the said dividends, interest, and annual income, a like annuity of 50*l.*, for her separate use; with a power to his said trustees, in their discretion, out of the income of his said estate, to make such further allowances as they should think fit to his said daughters Hannah and Mary: "and further, out of the said

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(1) Distinguished, *Wilkins v. Jodrell* (1879) 13 Ch. D. 564, 49 L. J. Ch. 26, 41 L. T. 649.

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dividends and income, to pay and apply the yearly sum of 50*l.* (and so in proportion for any less term than a year) for or towards the maintenance and education of his granddaughter Lettice," (daughter of Amelia, another daughter of the testator), in such manner as the said trustees should, in their discretion, think proper; and should, weekly and every week, during the life of his said daughter Amelia, from, with, and out of the said dividends, interest, and annual income, pay to her the weekly sum of 2*l.* 2*s.*, for her separate use; and should, during the life of Amelia, stand possessed of one moiety of the residue of the said dividends, interest, and annual income, after answering the purposes aforesaid, in trust for Amelia, for her separate use; and, during the life of his daughter Emily, stand possessed of the other moiety of such residue, in trust for Emily, for her separate use. And as to one moiety of the principal of the said trust monies, from and after the decease of Amelia, in trust for her child or children who should attain twenty-one or marry, as tenants in common, "with full power and authority for his said trustees, during the minority of such child or children, to apply the dividends, interest, and annual income arising from his, her, or their share or shares, for or towards his, her, or their maintenance or education," or else to accumulate and be added to the principal of such moiety: and as to the other moiety of the principal, after the decease of his daughter Emily, for the benefit of her child or children at twenty-one or marriage, on the same trusts as therein declared for Amelia's children. The testator gave power to his trustees to continue his business, and employ, if necessary, a competent part of his personal estate therein, the profits of the business, to be considered as part of the income of his estate. If they declined to continue the business, his partner and his son-in-law were to have the option successively of purchasing his share at a valuation, as therein mentioned, or, if they refused, to sell absolutely; with power to the trustees to give time for payment, either altogether, or by instalments with lawful interest;" and the monies to arise from such sale were to be considered part of his residuary personal estate, and to be applied accordingly. "And in case the funds applicable to the payment of the said several sums of 50*l.* each, and 2*l.* 2*s.* weekly, (whether such funds should consist of dividends, interest, and income thereinbefore mentioned, or the gains and profits of his said business, or be derived from both those sources), should at any time be insufficient to pay the said annuities and weekly sum in full, then and so often the said annuities and

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weekly sum should abate respectively rateably, and be paid for the time being according to such reduction." The testator died on the 15th December, 1847. Bowers never proved nor acted in the will: the two plaintiffs alone did so. By articles of partnership, dated the 1st January, 1847, the testator sold to one M'Culloch one-fourth part of his business for 1,271*l.*, and it was thereby provided that in the event of the testator wishing to retire, or dying in the lifetime of M'Culloch, the latter was to purchase the remaining three-fourth shares of the said business at the price of 3,342*l.*, to be secured, with interest thereon at the rate of 4*l.* per cent., by the bond of M'Culloch for payment thereof in five annual instalments of 668*l.* 8*s.* each, the first such instalment to be payable (in the event which happened) on the 1st April, 1853. The plaintiffs had duly received from M'Culloch the 1,271*l.*, with interest, and also the first instalment of 668*l.* 8*s.*, due on the 1st April, 1853, together with interest at 4*l.* per cent. from the 1st January, 1849; but M'Culloch refused to pay in advance the other instalments, which would fall due on the 1st April in each year up to 1857, or any interest thereon. The plaintiffs had paid debts and the first charges on the estate, and invested the residue, and applied the income, as far as it would go, in payment of the annuities of 50*l.* each and the weekly sum of 2*l.* 2*s.*; but the income being at present insufficient, these periodical payments were all considerably in arrear. The testator's daughter Hannah died on the 6th December, 1849; she had no legal personal representative. The testator's residuary personal estate consisted, at the filing of the bill, of 2,610*l.* 7*s.* 2*d.* Consols, and the four remaining instalments of 668*l.* 8*s.* each, and interest. Lettice, the granddaughter, had attained twenty-one, and a question arose whether her annuity was any longer payable. The testator's daughter Amelia had but the one child Lettice. The testator's daughter Emily (Mrs. Bevan) had six children at the date of the testator's decease; and had since had two more. All these eight children were infants. The bill prayed the direction of the Court as to the arrears of the annuities, whether they were payable, and if so, whether out of the future income of the estate; whether the annuity to Lettice ceased at twenty-one; and to have declared the rights of all parties in respect of the said arrears, and in respect of the continuance or discontinuance of Lettice's annuity.

Toller, for the plaintiffs, the trustees, stated the case.

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Dickinson, for the annuitants Amelia and Lettice, cited [*Soames v. Martin* (1), *Kilrington v. Gray* (2)].

Terrell insisted that the annuity to Lettice ceased on her attaining twenty-one, and that the subsisting annuities ought to be made good out of the capital. He cited [*May v. Bennett* (3), *Badham v. Mee* (4), *Blewitt v. Roberts* (5), *Yates v. Madden* (6), *Bourden v. Laing* (7), and other cases].

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Torriano, for those in remainder, argued in the same view, and relied on the difference in the will when the testator intended an annuity for the life of the donee.

May 2.

SIR W. P. WOOD, V.-C.:

Two questions were raised in this case—the first as to the gift for the maintenance of the testator's granddaughter Lettice, whether it is to continue beyond twenty-one; the other as to the construction of the will, whether in the events which have happened the annuities now payable will have to abate, the income of the testator's estate being insufficient to defray them. As to the first point, I was rather taken by surprise by that case of *Soames v. Martin* (1), in which it appeared that *Badham v. Mee* (4) was cited. But there was an older case, which was not cited there, nor in the case before me, viz. *Knapp v. Moyes* (8), in which there was a gift to daughters by name, of 1,500*l.* each, to be paid on their marriage, with consent of the executors, who were made guardians during their minorities, with a clause of maintenance till the portions became payable. One of the daughters attained twenty-one, and died without having been married; and Lord CAMDEN held that the condition as to marriage with consent was confined to a marriage under twenty-one, and that the legacy vested at twenty-one, or marriage under with such consent; and he relied upon the clause for maintenance. He says, "The clause of maintenance and education is also material. 'Till portions become payable' must be understood to mean 'till twenty-one, or marriage with consent.'" And he then goes on to say, "Maintenance and education are confined to minority, and though there may have been a case where, under the word 'education,' the provision has been extended after

(1) 51 R. R. 249 (10 Sim. 287).

(2) 51 R. R. 250 (10 Sim. 293).

(3) 25 R. R. 72 (1 Russ. 370).

(4) 32 R. R. 304 (1 Russ. & My. 631).

(5) 54 R. R. 291 (Cr. & Ph. 274).

(6) 87 R. R. 184 (3 Mac. & G. 542).

(7) 65 R. R. 552 (14 Sim. 113).

(8) Amb. 662.

twenty-one, yet that must have been a very special case, and contrary to the natural sense of the words." That, it is true, is only a *dictum* by Lord CAMDEN; but the same *dictum* occurs in *Badham v. Mee*. In that case there were the additional words "bringing up," which do not occur either in the case in *Ambler*, nor in *Soames v. Martin*, nor here; and in *Soames v. Martin* the VICE-CHANCELLOR OF ENGLAND seems to have thought that that word made the intention clearer that the annuity was to cease at twenty-one. I cannot see any difference, either on the etymology of the words or otherwise. I should have thought whatever consequences flow from the use of the one word would equally flow from the use of the other. And I find another case, *Foley v. Parry*, before the Vice-Chancellor of England (1), which was afterwards affirmed by Lord BROUGHAM, where the testator expressed his "particular wish that his wife and the infant's grandfather should superintend and take care of his education, so as to make him fit for any respectable profession or employment." There was no limitation as to time; and there were several other directions in the will, not, however, material at present. The wife was the tenant for life of the whole residuary estate, with remainder to the infant; and the VICE-CHANCELLOR held, and Lord BROUGHAM affirmed his decision, that the widow's estate for life was subject to a trust for the education of the infant, and that education must also involve maintenance, but that such trust did not extend beyond the minority of the infant. In fact, although, as the same learned Judge remarked on another occasion, education continues beyond twenty-one, yet after that age it is generally left to persons to educate themselves; and education after that time is not in any degree in the nature of a trust. There are several cases where there is an express trust extending beyond twenty-one years. Those, of course, do not apply here. Such is *Badham v. Mee* (2). (His Honour then referred to *Longmore v. Elcum* (3) and *Pride v. Fooks* (4).) It is also to be remarked, in favour of the conclusion to which I have come, that in this particular will there are several life interests given; and whenever the testator is treating of one of these, he expressly gives it during the life of the donee. I have, besides, the less difficulty in not following *Soames v. Martin* (5), because that case was somewhat peculiar, and nothing was said

(1) 39 R. R. 163 (5 Sim. 138; aff. 2 My. & K. 138).

(2) 32 R. R. 304 (1 Russ. & My. 631).

(3) 60 R. R. 192 (2 Y. & C. C. C. 663).

(4) 50 R. R. 227 (2 Beav. 430).

(5) 51 R. R. 249 (10 Sim. 287).

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there about the principal of the fund, or the application of it. There was one other possible construction pointed out to me, viz., that this provision might be taken to be limited during the life of Emily, the mother. But this might be very hard upon the infant, if the mother had died shortly after, leaving the infant still under twenty-one, and without any provision for maintenance. As to the second point, I think this will is very carefully framed, so as to point out what payments are to be charged on the capital and what on the income. The testator directs his trustees to take out of the income such and such sums. It turns out, on getting together his estate, that by a merely accidental circumstance, intended for the benefit of both partners, a large part of his capital and interest thereon is postponed for some years. The interest, however, when it comes to be received, will have to be treated as income, and not as principal; and although it is not income received during the present year, it seems to me that the legal construction is, that the legacies, the annuities, must for the present abate; but the deficiency will be got at and recouped when the interest comes to be paid, which, if immediately payable, would be income for the present year. That is not exactly abatement, but rather a postponement, during this interval, of the payment of a proportional part of the annuities. Costs of all parties out of the *corpus*.



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May 4.

WOOD, V.-C.

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BOURNE v. HARTLEY.

(18 Jurist, 532—533; S. C. 2 W. R. 452; 23 L. T. O. S. 219.)

By will the testator directed his executors "to invest a competent sum with any respectable Assurance Company in Ireland, either in their own names or in the name of his sister H., in the purchase of a clear annuity of 20*l*. for H. during her life." The testator was then residing in Ireland. He afterwards came to reside in England, and while there executed a codicil to his will, in which he directed his executors "to procure the purchase of an annuity of 20*l*. yearly from some approved Annuity Company in London or Dublin, to be paid to H. during her life:" Held, that the testator referred in both instruments to one and the same annuity, and that the gifts were not cumulative.

The identity of amount and of motive, coupled with the fact that the state of investment or condition of enjoyment is varied in the codicil, are strong circumstances to overrule the *prima facie* presumption in favour of the legatee taking both gifts.

THE first question raised was in reference to the annuity to Mrs. Achmuty, whether it was cumulative or merely a repetition. By his will, dated the 27th June, 1844, the testator directed his

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“said trustees or trustee to lay out and invest a competent sum of money with any respectable Insurance Company in Ireland, either in their or his own names or name, or in that of my said sister Mrs. Harriet Achmuty, in the purchase for her of a clear annuity of 20*l.* per annum during the term of her natural life.” In the second codicil, dated the 15th April, 1848, the testator directed “that the executors to these my said will and codicils thereto shall procure the purchase of an annuity of 20*l.* yearly from some approved Annuity Company in London or Dublin, to be paid by such Annuity Company to my said sister Harriet Achmuty, the widow of the late Dr. Achmuty, now residing at Aughmore, for and during the life of the said Harriet Achmuty.” The testator died in October, 1851, leaving his widow and five children him surviving.

G. L. Russell, for the plaintiff, Richard Hartley Wallscourt Bourne, the only infant son of the testator, contended that these two gifts both referred to one and the same annuity, and cited *The Duke of St. Albans v. Beauclerk* (1), *Benyon v. Benyon* (2), *Hooley v. Hatton* (3), and *Fraser v. Byng* (4).

Giffard, for Frances M. Bourne, a sister of the plaintiff, in the same interest, cited, in addition, *James v. Simmons* (5).

Bonham Carter, for the defendant Mahon, an executor.

Ellison, for another defendant in the same interest.

Rasch, for the annuitant, cited [*Suisse v. Lord Louther* (6) and *Lee v. Pain* (7)].

SIR W. P. WOOD, V.-C. :

The difficulty I felt at chambers was, looking to the rule laid down in *Lee v. Pain* (7) and *Suisse v. Lord Louther* (6), in both of which Sir J. WIGRAM, V.-C., affirmed the doctrine, that the right of a legatee to take both of two or more several gifts is not to be cut down by doubtful words, or by a balance of argument on other parts of the will. But although I entertained some doubt, the full argument of which I have now had the benefit, and the case of *Fraser v. Byng* (4), have enabled me to come to a decision. That case was

(1) 2 Atk. 636.

(2) 11 B. R. 12 (17 Ves. 34).

(3) 1 Br. C. C. 389. See 26 B. R. 69, n.

(4) 32 B. R. 154 (1 Russ. & My. 90)

(5) 2 H. Bl. 213.

(6) 62 B. R. 170 (2 Hare, 424).

(7) 67 B. R. 41 (4 Hare, 217).

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fully considered and adopted by Sir J. WIGRAM, V.-C., in his judgment in *Lee v. Pain*. The decision in *Benyon v. Benyon* (1) establishes *this—that where you have not a mere repetition of the gift, but you can see a particular legacy repeated, with some slight variation in the mode or condition of enjoyment, that may be a sufficient reason for its being mentioned again, and therefore the second legacy is in such a case to be held not cumulative. It is quite plain that the Judges have endeavoured to escape from the rule laid down in *Hooley v. Hatton*. The case of *Fraser v. Byng* was a stronger case than the present, for there there was a difference in the mode of enjoyment in the meantime; the testator directed a certain annual payment in the first codicil, but in the second codicil he left everything to the discretion of his executor. In the present case the testator has made two modifications; he has directed the annuity to be purchased at any Assurance Company in England as well as Ireland; the other is, that he makes it payable to her directly, without the necessity of the intervention of trustees. These circumstances take the present case within the exception mentioned in *Fraser v. Byng*. The costs of this lady must be allowed to her out of the estate. I understand that she was not originally a party to the suit, but brought here merely to argue this question, which has arisen on the construction of the will, and is created by the testator himself.

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July 4.

KINDERSLEY,
V.-C.
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COCHRANE v. FEARON (2).

(18 Jurist, 568.)

Security for costs.

In this case the plaintiff had obtained an order for leave to file a supplemental bill, and for payment of certain costs. One of the defendants now presented a petition, praying that so much of the order as related to the payment of costs might be discharged.

G. L. Russell and Daly, for the petitioner.

Anderson and Collins, for the plaintiff, asked that the petitioner might give security for the costs of this petition, as he was out of the jurisdiction.

C. P. Cooper, Glasse, G. M. Giffard, Welford, and W. Morris, for other parties.

(1) 11 R. R. 12 (17 Ves. 34).

Co. (1876) L. R. 2 Ch. 531, 45 L. J. Ch.

(2) *In re Percy and Kelly, Nickel, &c.*

526.

Sir R. T. KINDERSLEY, V.-C., said that no authority had been produced, and he must decline to make a precedent. Where a person had been brought before the Court in a suit, he must have a right to present a petition in that suit; and his Honour refused to order the petitioner to give security for costs.

COCHRANE
v.
FEARON.

IN RE ELLERTHORPE.

(18 Jurist, 669.)

Practice—Trustee Act—Vesting.

THIS was a petition under the Trustee Act, 1850, for an order to vest the legal estate, which was outstanding, in the infant heir of an intestate mortgagee. The owner of the equity of redemption had devised it to his three daughters, charged with a legacy of 200*l*. The three daughters now made the application, and asked that the estate might be vested in them, subject to the legacy.

1854.
July 28.
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[669]

Sheffield, for the petitioners, relied on the 7th section of the Act.

Hopwood, for the infant heir.

Sir R. T. KINDERSLEY, V.-C., doubted whether he had power to make such an order under the Act, but observed that no doubt, if a conveyance were to be made, it would be in that form; and finally he made the order.

MITCHELL v. M'ISAAC (1).

(18 Jurist, 672—673.)

A testator who was entitled to a redeemable annuity of 100*l*. per annum, of which at his death nearly five annual payments were in arrear, gave "all his right, title, and interest in the said annuity, and also all monies to arise therefrom in case the same should be redeemed," to his brother, J., and he gave all the arrears, including the payment then accruing to his wife, for the benefit of two infants. The testator died almost immediately afterwards. He was aware that it was very uncertain whether anything whatever could be recovered in respect of the payments in arrear during

1854.
May 9.
WOOD, V.-C.
[672]

(1) The bequest of the annuity to the testator's brother was treated as "residuary," but it appears to have been as specific as the bequest of the arrears to the testator's widow.—O. A. S.

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M'ISAAC.

his life, or in respect of future payments. Ultimately, however, a sum of 1,694*l.* was recovered, the whole sum due in respect of the annuity (including the arrears due at the decease of the testator) being nearly 3,500*l.*: Held, that the widow was entitled to take payment in full of the arrears so given to her, before J. could take anything.

By deed, dated the 5th September, 1804, an annuity of 100*l.* per annum had been granted to William Mitchell, the testator, by W. A. Mitchell, for the term of ninety-nine years, if William Mitchell and two other persons therein named, or the survivor of them, should so long live. The annuity had been duly paid down to December, 1811, but from that period no further payments were made, and it was not until 1847 (after the decease of the surviving life) that the sum of 1,694*l.* was obtained in respect of the unpaid portions of the annuity, as hereinafter mentioned. By his will, dated the 26th December, 1816, the testator gave to his brother, John Mitchell, "all my right, title, interest, and claim in and to the annuity of 100*l.* now secured to me by W. A. Mitchell, and also all monies to arise therefrom in case the said annuity should be redeemed." The testator also gave "the interest or payments arising from the said annuity, until the 5th March then next, to his said wife, to be by her applied for and towards the maintenance and education of the testator's nephew Charles and his stepson Peter." The testator died in January, 1817. There was due at the date of the will (the 26th December, 1816) the sum of 500*l.* arrears of the said annuity. The testator had previously to 1813 been told that it would be extremely dangerous to press his claim, on account of the health of the parties, and other circumstances. The last of the three lives named in the annuity grant expired on the 19th January, 1847. The arrears of annuity then amounted to 3,473*l.* 10*s.* 6*d.*, viz. 569*l.* 7*s.* 6*d.* up to the 9th March, 1817, and 2,904*l.* 3*s.* from the 9th March, 1817, up to the 19th January, 1847, when the annuity ceased. The testator's widow survived him, and married M'Isaac. Mrs. M'Isaac received altogether the sum of 1,674*l.* cash, being the residue of a sum which had in 1816 been paid into Court as the redemption money of the annuity. She contended that she was entitled to retain out of that sum, in the first place (besides all costs, &c.), the arrears up to the 9th March, 1817, and that the plaintiff was only entitled to the balance after she had been paid in full. The plaintiff, who was the son and sole next of kin of the testator's brother, John Mitchell, contended that she ought to abate proportionally, and that the net residue of the 1,674*l.* ought to be divided between

them (the plaintiff and the defendant) in the proportion which 569*l.* 7*s.* 6*d.* bore to 2,904*l.* 3*s.*

MITCHELL
v.
M'ISAAC.

Rolt and Bagshawe, for the plaintiff, [cited *Page v. Leapingwell* ()]:

Here the testator has not given a fixed sum to his wife, and the residue to his brother; he has given a certain number of annual payments to his wife, and the remaining annual payments to his brother.

James and Charles Hall, for the defendant, [cited *Petre v. Petre* (2)]:

The testator must have contemplated the possibility of a deficiency, for he had mentioned to the trustee that it was a doubtful security, and that to sue would be fatal. This is not the case of a gift to the widow for life, with remainder to the brother.

Rolt, in reply.

SIR W. P. WOOD, V.-C.:

The first thing to try is, what the consequence would be if the testator had thought that the fund was likely to fail, as he might have done. The testator might well have contemplated that, from the difficulty he had had in obtaining some of the payments of the annuity. It would stand thus—that he wished to have a particular fund applied in maintaining his nephew and stepson. He meant that a given sum should be applied to a particular purpose, and that his brother should take his chance of the rest of it after failure of that particular purpose. But if he thought that the whole thing would have to be realised, which is the strongest way of putting it for the plaintiff, there would have to be the whole series of payments for the life of the cestui que vie measured out, and then a calculation made of the whole value of the annuity; and out of that, the estimated value, *during the life of the widow, is to be given to her for the purposes mentioned in the will; and the residue only is all that is given to his brother; and it is argued, that the whole of the annuity not having come to hand, the brother should have his full proportion. I think that is not the natural construction to put upon the will, looking to the special purpose, i.e. maintenance, expressly referred to in the will. The most reasonable interpretation would be, to hold that he intended to give enough to effect that purpose; and the residue only, after

[*673]

(1) 11 R. R. 234 (18 Ves. 463).

(2) 92 R. R. 77 (14 Beav. 197).

MITCHELL ^{c.} satisfying that purpose, to his brother, for his own benefit. I do not doubt but that if the testator had been reminded that it was uncertain how long the cestui que vie might live—that there was a definite object on the face of his will, and an indefinite fund to effect that object—he would have said, “My intention is, that the whole shall be turned into one fund, out of which this object shall be effected; and what remains, I deal with so and so.” I think that whole intention is expressed in the will.

Costs out of the fund, residue to the plaintiff.

1854.
March 30.

EVANS v. HUGHES.

(18 Jurist, 691.)

WOOD, V.-C.
[691]

E. and H. were partners under articles. One of the terms was, that on the decease of either partner, his personal representative should have the power, within three months, of electing to continue the share of the deceased partner; and if he declined, then the business, stock in trade, &c. were to be valued, and the surviving partner was to take to the whole, giving security for the moiety belonging to the estate of the deceased partner. E. died: Held, that during the three months, or until E.'s personal representative should elect, the survivor, H., was to be prevented by injunction from carrying on the business in any other firm-name than that used in the life of E.

THE plaintiff's late husband had carried on business with the defendant under the firm of Evans and Hughes. One of the clauses of the partnership articles provided, that on the decease of either of them, his personal representative might, if he should so decide within three months after the decease of his testator, take to the deceased partner's share; but if he should elect not to do so, then a valuation was to be made, and the surviving partner was to take to the whole, giving security for the moiety belonging to the estate of the deceased partner. Evans died, leaving the plaintiff, his widow and executrix. Some correspondence ensued, which the Court held did not amount to an election by the plaintiff not to continue a partner. The defendant, however, so treated it, and painted out the name of Evans; published an advertisement of the dissolution, and that he, the defendant, thenceforth would carry on such business on his own sole account; refused to account with the plaintiff, &c.; and refused to take the goodwill of the business into the valuation, which was estimated at 1,200*l*. The case now came on on an interlocutory motion for an injunction.

Rolt and Karlake, for the injunction.

Willcock, for the defendant, insisted that this was but a partnership at will, to which, therefore, it was useless to admit the plaintiff.

EVANS
v.
HUGHES

SIR W. P. WOOD, V.-C.:

If the defendant is right, he will be losing little or nothing by continuing to use the old firm. The business will be just as good three months hence. If the plaintiff be right, she will lose everything in case the defendant be allowed to use his own name alone.

Rolt, in reply.

Sir W. P. Wood, V.-C., after going through the details of the case, showing that the plaintiff had not, in fact, elected to retire from the partnership, or at any rate that there was strong ground for contending that she had not done so, granted the injunction asked, which was to restrain the defendant from carrying on the business under any other firm or style than that used in the lifetime of Evans; although at the hearing it might turn out that the defendant was wholly entitled, on the ground of comparative damage.

ANONYMOUS.

(18 Jurist, 770—771.)

1854.

June 1.

Infant defendant out of jurisdiction—Guardian *ad litem* ought to be within the jurisdiction.

WOOD, V.-C.

[770]

HETHERINGTON moved, in a case where an infant defendant *was out of the jurisdiction and in prison, to appoint a person guardian *ad litem*. Upon reading the affidavits it appeared that the proposed guardian was also out of the jurisdiction. The Court will dispense with the production of the infant in Court.

[*771]

SIR W. P. WOOD, V.-C.:

It is not absolutely necessary to produce the infant in Court; but it is as well to have for a guardian some person within the power of the Court to reach. Unless, therefore, some authority for the appointment be produced, I shall direct this to stand over, in order that some person resident in England may be appointed.

1854.
June 5.

WOOD, V.-C.
[786]

IN RE HODGSON, EX PARTE CUNLIFFE.

(18 Jurist, 786 ; S. C. 2 W. R. 539.)

A legacy of 2,000*l.* being given to H. and D. for life, with remainder to their issue, and in default of issue to fall into the residuary estate, and H. and D. being dead without issue, the trustees paid it into Court, under the Trustee Relief Act, in the names of H. and D. The trustees at the same time paid into Court, under the same Trustee Relief Act, another legacy of 5,000*l.*, in which C. was interested. C. presented a petition to have his share of the 5,000*l.* legacy paid to him, and have his costs paid out of the 2,000*l.* legacy, treating it as residue. There was no suit for the administration of the estate : Held, that the Court had no jurisdiction to order payment of the costs of the petition out of any other fund than the 5,000*l.* legacy.

UNDER the will of William Hodgson a legacy of 5,000*l.* was bequeathed upon trusts, by which the petitioner was entitled to an aliquot share. Another legacy of 2,000*l.* was bequeathed to two for life, with remainder to their issue. The trustees paid both shares into Court, under the Trustee Relief Act, to the separate accounts of the legatees ; although, the legatees for life of the 2,000*l.* being then dead without issue, that sum had fallen into the residue of the testator's estate.

J. Templeton Wood, for the petitioner, whose claim to a share of the 5,000*l.* was not disputed, asked not only for payment out of Court of that share, but also that his costs might be paid out of the 2,000*l.*, as being part of the residuary estate. [He cited several cases to show that the costs should be paid out of residue.]

THE VICE-CHANCELLOR, [after pointing out that the orders in those cases were in suits for administration, said] :

In this case the trustees have paid in one sum of 5,000*l.*, in which the petitioner is interested, and another sum of 2,000*l.*, in which he has no interest under the will. It is as if it were paid in to an account intituled "the residue of the testator's estate." All I can deal with on this petition is the sum of 5,000*l.*, in which the petitioner is interested. The circumstance of the trustees having paid in another sum of 2,000*l.*, which falls into the residue, does not entitle the petitioner to ask for his costs out of that, on the ground that costs are generally paid out of the residue. The case must be just the same as if the trustees had part of the residuary estate in their hands, or as if some dispute arose on another part of the estate in which the present petitioner was not interested, and the trustees paid the residue, or the portion as to which the

dispute arose, into Court; the petitioner could not ask to have his costs paid by the trustees out of the residue in their hands, or out of that fund so paid in, on the ground that costs are usually paid out of residue.

In re
Hodgeson.

Pole, Wickens, and Cairns, for other parties.

HOPE v. HOPE.

(18 Jurist, 823—826; S. C. 2 W. R. 674.)

1854.
July 14, 15,
29.

A testamentary reference in general terms to all powers which the testator can exercise, forming part of a general bequest of all his own property, will not usually operate as an exercise of a special power subsequently given to him.

[This case is also reported in 5 Giffard, 13—26 (published in 1871), and is commonly cited from that report, and is accordingly reserved until that report is reached: see several later cases upon the same subject cited in *In re Hayes* [1901] 2 Ch. 529, 70 L. J. Ch. 770, 85 L. T. 85, C. A.—O. A. S.]

LANGTON v. LANGTON.

(18 Jurist, 928.)

1854.
July 10.

WOOD, V.-C.
[928]

The testator bequeathed certain annuities to his eight children by name, and directed that when any of them should die an additional annuity of 50*l.* should be divided among the survivors and survivor of them. S., one of the eight children living at the date of the will, afterwards died in the lifetime of the testator; and the testator died in 1801. The other children were now all deceased but two. On the death of each child who survived the testator an additional annuity of 50*l.* had been invested, but no addition was made in consequence of the death of S. No account of the arrears was prayed: Held, that it was now too late to seek to have the annuity purchased.

DANIEL and *Whitworth* were for the petitioners, and stated the circumstances. The will of the testator, dated 1800, after giving a rent-charge of 800*l.* per annum, secured on all his real estate, to his eight children, naming them, and the survivors and survivor of them, gave the rest of his property to the residuary legatees and devisees; and there was a special proviso, "that from time to time, when and as often as it should happen that any one of them, my said eight children, shall die, then and in every such case I give one annuity of 50*l.* to the others and other, and survivors and survivor of them, during the lives of the survivors and of the longest liver of them." The annuities were legal rent-charges, with powers of distress and entry. Stephen Langton, one of the

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children of the testator who was living at the date of the will, died before the testator. The testator died in 1801, and ever since the rent-charge of 800*l.* had been duly paid, and had in the interval been increased by 250*l.* per annum, being an increase of 50*l.* on the decease of each of five of the said eight children who had survived the testator and died since. There were now, therefore, two still surviving, who presented this petition. The original annuity had not been augmented by an addition of 50*l.* in consequence of the death of Stephen, as his death in the lifetime of the testator had been treated not only as causing a lapse of his own beneficial interest, but as abrogating the direction respecting the augmentation on the death of each child.

Daniel and *Whitworth* now were about to argue the question, that although Stephen, dying before the testator, took no benefit himself, yet that that could not take away the annuity provided upon that event for the surviving children of the testator; when

James and *Bristowe* took the objection that the Statute of Limitations barred the claim, and cited *James v. Salter* (1). This is not the case of a trust; it is a legal rent-charge.

Daniel suggested that that case applied only to arrears of the annuity; that what was now sought was not any payment on account of the arrears, but only to have this additional 50*l.* provided for the future. They have got a receiver appointed, whom we may not disturb.

SIR W. P. WOOD, V.-C.:

I cannot distinguish this case from that cited. The receiver is appointed without prejudice to incumbrancers. Your estate is not altered by his having been appointed; and your right appears to have been barred by lapse of time before that occurred.

(1) 43 R. R. 741 (3 Bing. N. C. 544).

PARRY v. HUDDLETON.

(18 Jurist, 992.)

1854.
July 8.

Payment by executor of interest on legacy is *prima facie* an admission of assets. WOOD, V.-C.
[992]

In this case a legacy of 300*l.* had been left to Mrs. Parry, the plaintiff, by the testator, who died in 1844. The defendant, the executor, paid interest on the legacy from 1845 to 1850, since which time no interest had been paid; and being recently applied to for payment of the legacy and arrears of interest, he declined so to do, on the ground of deficiency of assets.

Rasch, for the plaintiff, argued that the payment of interest would operate as an admission of assets and assent by the executor to the legacy.

Selwyn, contra, insisted that this alone would not do.

SIR W. P. WOOD, V.-C. :

I think there are authorities which show that payment of interest, unexplained at the time or in the cause, will amount *prima facie* to an admission of assets by the executor. The rule is, at all events, that it throws upon him the *onus* of explaining it; and if the defendant wishes for an inquiry, he shall have it; if not, there must be an order for payment to the plaintiff, with costs, in a month.

The defendant declined the inquiry, and the order was made accordingly.



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— 14. — "Family"—Exception of "real and personal estate which I may derive from my aunt M. or any of her family"—Held to cover a vested interest under the will of testator's grandfather, subject to a life estate in his grandfather's daughter M. *James v. Lord Wynford* 236

— 15. — "Ready money"—Money left in hands of agent for investment held to pass. *Cooke v. Wagster* 213

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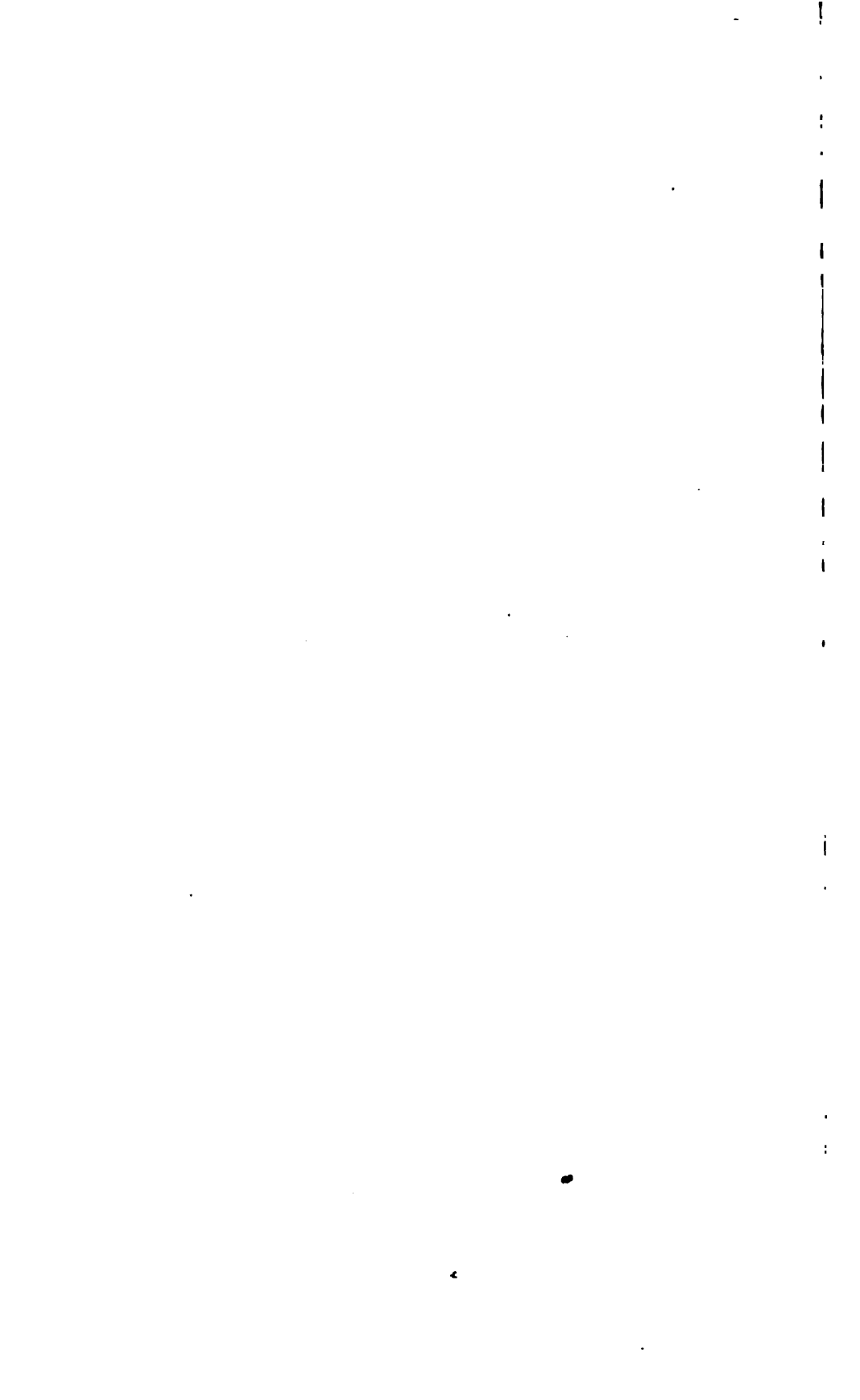
— 20. — **Vesting—Remoteness—Gift over to daughters’ “respective children for their support and maintenance until they shall attain the age of twenty-two years severally they to receive the principal and interest as they attain such age in equal shares”—On death of any child under 22 the shares to be divided equally among the survivors—Held that payment and not vesting was postponed till 22—Divesting clause held void.** *Hobbs v. Parsons* 175

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— **“Heir male.”** *See Will, 10.*

— **“Ready money.”** *See Will, 15.*

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